Fall 2006

Court Review: Volume 43, Issue 3 – Complete Issue

Volume 43, Issue 3

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

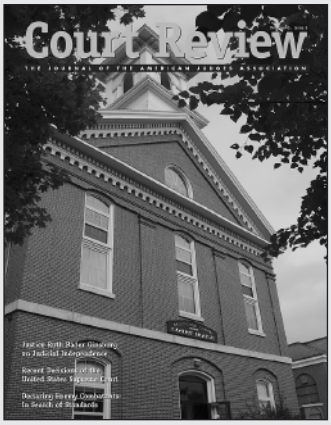
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 43, Issue 3 Fall 2006

EDITOR'S NOTE

We welcomed Alan Tomkins as coeditor of *Court Review* in the last issue. This issue marks my return to *Court Review* from the overall leadership of the American Judges Association (see page 111 for the new president's opening remarks). I certainly enjoyed my year as AJA president, but it will be great to be able to refocus on *Court Review* and its role as an aid to judges both in doing their daily work and in protecting the role of independent judges in our society.

For those of you who were unable to attend the AJA's annual educational conference in Vancouver in September 2007, we will bring you some of the highlights in this and coming issues. In this issue, we present the remarks of United States Supreme Court Justice Ruth Bader Ginsburg on judicial independence. She was a delightful guest at our conference, and we believe you will find her remarks of interest.



This issue also includes Professor Charles Whitebread's annual review of recent decisions of the United States Supreme Court. One of the highlights of each of AJA's annual educational conferences is Professor Whitebread's presentation of commentary about these decisions. In Vancouver, Justice Ginsburg both attended Professor Whitebread's presentation and responded to it. Even without her insightful comments, though, having an overview of the past year's decisions of the Court will be of interest to most judges. We invite you to attend our 2008 annual educational conference (September 7-12 in Maui, see page 151) for Professor Whitebread's update on the decisions of 2008.

This issue concludes with an article by Joseph Storch on the standards under which the United States is holding its own citizens as enemy combatants. Because those standards have not been explicitly detailed by the government, Storch's informed surmise about the standards being used raises important questions and provides some initial conclusions.

In a future issue, we will follow up on another presentation made at the Vancouver AJA conference—the AJA's first "white paper," which was presented and adopted by the AJA at the Vancouver conference. That paper recommends a number of steps judges and courts can take to increase the perception of procedural fairness in our courts. We have a special issue in the works on that topic; it will include—but go beyond—the paper presented in Vancouver. Before the special issue on procedural fairness, we'll have a special issue on the use of social-science concepts, including psychology, in the courts. Stay tuned. — Steve Leben

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 128. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to one of Court Review's editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is of the Washington County Courthouse in Machias, Maine. The courthouse was built in 1853; the cupola and bell were added in 1868. The courthouse is listed on the National Register of Historic Places.

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President's Column

Eileen Olds

I can never say enough what an honor and a privilege it is to have been elected to serve as your 46th president of the American Judges Association. I have used that time since our annual conference in Vancouver to crystallize my vision of what I would like to accomplish during my tenure and of what I believe we can accomplish together. The potential to see dreams realized is what keeps us going! Like many of you, I have concluded that judges in general—and the members of AJA in particular—must seize the opportunity to improve our delivery of services within the justice system and to address the continuing concerns that we as judges have.

When I joined AJA in 1995, I never envisioned leading this most important and distinguished body of judges from all states and provinces, from different levels and jurisdictions, and from courts with varying subject matters. What I now know for sure is that wherever we sit, we have many commonalities that bind us.

When I first became a member, none of the following—cyber-crimes, security concerns, election reform, multilingual litigants, caseflow management, court technology, domestic-violence protective orders—were at the forefront. Drug courts and a host of other specialty and problem-solving courts were rare. How things have changed in just 12 short years! One of the most significant benefits of AJA to me has been the exposure to the best practices and educational programs on all of these subjects as they were emerging.

Thanks to the efforts of our immediate past president, Steve Leben, we were successful in trademarking the phrase that for years has defined AJA, the Voice of the Judiciary.® I am proud to be at the helm when we will have a voice that is louder than ever. As the Voice of the Judiciary, AJA is poised to meet unprecedented challenges. We must be prepared to rise to the occasion whenever topics of importance to the judiciary arise.

I realize that I have taken office at a time when access to the ideals of justice are often called into question. Whether it is the debate regarding the crack cocaine–powder disparities in sentencing or the Jena 6 movement, or the overrepresentation of minorities in the criminal-justice system, access-to-justice issues abound. I can assure you that I am personally invested in involving our membership in a critical examination of such topics. Our education committee, led by Judge Elliott Zide of Massachusetts and Judge Mary Celeste of Colorado, is mindful of the need for continuing education in these areas.

Self-representation by litigants is at an all-time high, and this complicates access issues even more. The risk for inefficiencies, as well as many unintended consequences, are expensive and time consuming for the court system. It is the pro se litigant who most often confuses procedural fairness with perceived fairness. I am also convinced that we can do more to educate the public about our roles, authority, and limitations as judges. My "Tell It to the Judge" initiative is designed to open the dialogue between stakeholders in the judicial system and the public. It is more than fitting since we live during a time in history where there is raging debate over the role of judges in our society.

Like you, I have seen a progressive influx of mentally ill persons in our courtrooms. In Virginia alone, 15% of jail and prison inmates have a serious mental illness, and 43% percent of juveniles in detention are diagnosed with mental and emotional disorders. Virginia's experience is typical. We judges must examine responsible and necessary steps to deal with this: the potential for criminalization of mental illness is something we cannot afford to ignore. For this reason, I have appointed an ad hoc committee to address these concerns. Judges Belinda Hill of Texas and Judge Lynda Howell of Arizona will co-chair this committee.

For all of us, ensuring access and fairness and strengthening and preserving the independence of the judiciary must remain priorities. We as AJA members are bound together, not just by our friendships, but also by a mutual dedication to these concepts.

The beginning of a new year is a time for all of us to reflect on our successes and disappointments of the past and to focus on our hopes for the future. It is the same with the AJA. 2007 brought with it many successful firsts including the first AJA white paper, thanks to Judge Kevin Burke of Minnesota and Judge Steve Leben of Kansas. I am hopeful in this organizational year that we will see many firsts as well, including the "Tell It to the Judge" programs and the committee on issues of mental health in criminal justice.

Equal access to all who come before us, and independence to carry out our duties in our courtrooms, faithfully and impartially, are pillars of our judiciary. I greet 2008 with optimism as we continue to serve the nation's judges and the public by elevating all that is good about our profession!

Remarks on Judicial Independence

Ruth Bader Ginsburg

Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially. As experience in the United States and elsewhere confirms, however, judicial independence is vulnerable to assault; it can be shattered if the society law exists to serve does not take care to assure its preservation.

On the essence of independent, impartial judging, a comment by former U.S. Chief Justice William H. Rehnquist seems to me right on target. Using a metaphor from his favorite sport, he compared the role of a judge "to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it."[1]

My remarks concentrate on judicial independence in the system I know best, the Third Branch of the U.S. Government—the federal courts—and on efforts by the political branches to curtail that independence.

I.

Under the U.S. Constitution, federal judges hold their offices essentially for life, with no compulsory retirement age, and their salaries may not be diminished by the legislature.[2] (Canadian judges enjoy similar "security of tenure," although retirement at age 75 is mandatory.[3]) Through life tenure and compensation that cannot be reduced, the founders of the United States sought to advance the Judiciary's independence from Congress and the President, and thus to safeguard the judges' ability to decide cases impartially. Yet I doubt that constitutional insulation would have protected the federal bench if we did not have a culture that frowns on attempts to make the courts over to fit the President's or the Congress' image.

A well-known illustration of that culture. Some 70 years ago, a proposal to pack the U.S. Supreme Court was announced by President Franklin Delano Roosevelt. The Supreme Court of that day had resisted President Roosevelt's New Deal program. In a 13-month span, the Court held unconstitutional 16 pieces of federal social and economic legislation.

Frustrated by his inability to replace the "nine old men" then seated on the Court, President Roosevelt sent to the Senate a bill to overcome the Court's recalcitrance. He proposed adding one justice for each member of the Court who had served ten years, and did not retire in the six months following his seventieth birthday.[4] FDR's proposal would have immediately swelled the Court's size from nine to 15 members. (If the 1937 plan were to be applied to the current Court, we would today have a 13-member bench.) Two developments, manifest by the end of 1937, contributed to the defeat of Roosevelt's plan: public opposition to the President's endeavor to capture the Court; and a growing understanding among the justices that it was appropriate to defer to legislative judgments on matters of social and economic policy. FDR's idea has never been renewed. Those who care about the health and welfare of our system appreciate that packing the Court to suit the mood of the political branches (Congress and the President) would severely erode the status of the Judiciary as a coequal branch of government.

II.

I turn now to some recent threats to the security of U.S. judges who decide cases without regard to what the "home crowd" wants.

A headline-producing case in point. Early in 2005, federal courts sitting in Florida confronted a cause célèbre. On order of the Florida state courts, a hospital had removed the feeding tube from Terri Schiavo, a severely brain-damaged woman whose situation sparked a huge controversy over the right to

Editor's Note: These remarks were delivered by Justice Ginsburg on September 27, 2007, at the annual educational conference of the American Judges Association. Because the conference took place in Vancouver and was a joint conference with two Canadian judicial organizations, she included some references to Canadian sources.

Footnotes

1. William H. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980).
2. The Constitution guarantees that federal judges "shall hold their Offices during good Behavior . . . and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art III, § 1, cl. 2. Proposals have been made to place term limits on U.S. Supreme Court service. See, *e.g.*, R. CRAMTON & P. CARRINGTON, THE SUPREME COURT RENEWAL ACT: A RETURN TO BASIC PRINCIPLES, *IN* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467–471 (R. Cramton & P. Carrington eds. 2006) (proposing 18-year limits on active service); Calabresi & Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769 (2006). But so far, discussion of such measures has remained largely academic. See, *e.g.*, L. Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES, Sept. 9, 2007, p. A20 (stating that the legislation proposed by Profs. Cramton and Carrington "has not found a sponsor").
3. See Constitution Act of 1867, §§ 99–100.
4. See Judiciary Reorganization Act, S. 1392, 75th Cong. § 1(a) (1937), *reprinted in* Reorganization of the Federal Judiciary, S. Rep. No. 75-711, p. 31 (1937).

refuse life support. Congress entered the fray by passing a most unusual statute giving the federal courts jurisdiction to hear the plea of Terry Schiavo's parents, but not altering the governing substantive law.[5] The federal courts read the statute as it was written, and refused to override the Florida courts by ordering restoration of the feeding tube. This was not the outcome wanted by a goodly number of the members of Congress. In angry reaction, the then House Majority Leader accused federal judges of "thumb[ing] their nose[s] at Congress and the [P]resident."[6] He warned: "[T]he time will come for the men responsible for this to answer for their behavior."[7] "Congress," he amplified, "for many years has shirked its responsibility to hold the judiciary accountable. No longer."[8]

Similarly unsettling, in the same year, 2005, two episodes of violence against judges shocked the nation. A state court judge was murdered while on the bench in Atlanta and a federal judge's mother and husband were murdered at the judge's home in Chicago.[9] Shortly thereafter, a prominent Senator gave a widely reported speech on the Senate floor. After inveighing against "activist jurists," he suggested there may be "a cause-and-effect connection" between judicial activism and the "recent episodes of courthouse violence in this country."[10]

The blasts from Congress were not merely verbal. In May 2005, the House Judiciary Committee considered creating an "office of inspector general for the federal judiciary."[11] The office would investigate allegations of judicial misconduct and report them to Congress. The Committee's chairman said, in announcing the proposal, that judges must "be punished in some capacity for behavior that does not rise to the level of impeachable conduct."[12] If the then chairman's subsequent action indicated the role he envisioned for the proposed inspector general, judges had good cause for concern. In June 2005, that chairman's office dispatched a letter to a U.S. Court of Appeals, complaining that the court had affirmed an unlawfully low sentence for a narcotics-case defendant. The letter called for a "prompt response . . . to rectify" the decision,[13] even though the government sought no further review of the sentence.

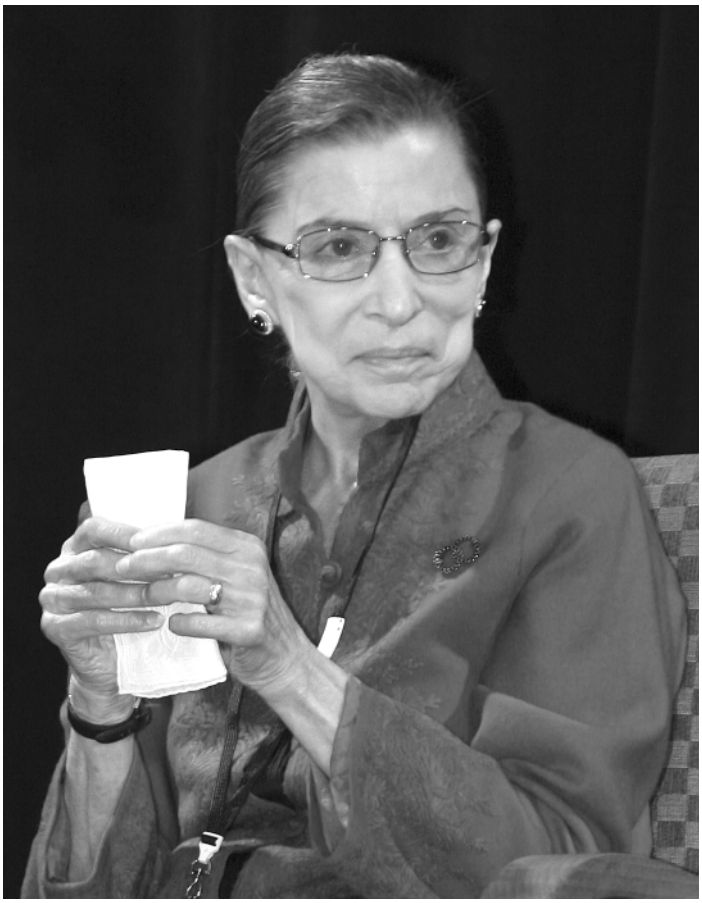
Another troubling congressional initiative: proposals to prohibit federal courts from relying on foreign law.[14] A misunderstanding appears to underlie the opposition to foreign law citations. As Justice Stephen Breyer explained in a recent interview, citations to foreign laws and decisions should not be controversial.[15] "References to cases elsewhere are never binding," Justice Breyer emphasized. We interpret and apply only our own Constitution, our own laws. But it can add to our store of knowledge "to look at how other people [with a commitment to democracy similar to our own] solve similar problems." (In this regard, I have found enlightening decisions of Canada's Supreme Court.) Justice Breyer compared references to the decisions of foreign and international tribunals to references to a treatise or to a professor's work.

Lest I appear to be spreading too much gloom, I should emphasize the vocal defenders of the Judiciary, intelligent voices that do not divide along party lines. The *New York Times*, a paper some regard as "liberal," recently editorialized: "The courts will not always be popular; they will not always be right. But if Congress succeeds in curtailing the judiciary's

5. See Act for the Relief of the Parents of Theresa Marie Schiavo §5, Pub. L. No. 109-3, 119 Stat. 15, 16 (Mar. 21, 2005) ("Nothing in this Act shall be construed to create substantive rights . . . .").
6. *Quoted in* Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Mar. 31, 2005, at A1.
7. *Quoted in id.*
8. *Quoted in* Editorial, *Attacking a Free Judiciary*, N.Y. TIMES, Apr. 5, 2005, at A22.
9. Editorial, *Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22.
10. *Quoted in* Charles Babington, *Senator Links Violence to 'Political' Decisions; 'Unaccountable' Judiciary Raises Ire*, WASH. POST, Apr. 5, 2005, at A07.
11. *Quoted in* David D. Kirkpatrick, *Republican Suggests a Judicial Inspector General*, N.Y. TIMES, May 10, 2005, at A12.
12. *Quoted in id.*
13. *Quoted in* Maurice Possley, *Lawmaker Prods Court, Raises Brows; Demands Longer Term in Chicago Drug Case*, CHI. TRIB., July 10, 2005, at C1.
14. *See* S. Res. 92, 109th Cong. (2005); H. Res. 97, 109th Cong. (2005); Constitution Restoration Act, S. 520, H.R. 1070, § 201, 109th Cong. (2005); American Justice for Americans Citizen Act, H.R. 1658, § 3 (2005).
15. *Toward "Active Liberty*," HARV. L. BULL. 14, 18 (Spring 2006).

ability to act as a check on the other two branches, the nation will be far less free."[16] Former Solicitor General Ted Olson, generally perceived as conservative, published a similar view: "Americans understand," and I hope he is right, "that no system is perfect and no judge immune from error, but also that our society would crumble if we did not respect the judicial process and the judges who make it work."[17]

History suggests that Congress is unlikely to employ the nuclear weapon—impeachment—against judges who decide



cases in a way the "home crowd" does not want. In the 219 years since the ratification of the Constitution, the House of Representatives has impeached only 13 federal judges; in only seven instances did impeachment result in a Senate conviction,[18] and those judges were removed not for wrongly interpreting the law, but for unquestionably illegal behavior, such as extortion, perjury, and waging war against the United States.[19]

Although politically driven impeachment of federal judges is a remote prospect, yet another threat to judicial independence cannot be discounted so easily. In President Clinton's second term, it bears reminding, political hazing of federal judicial nominees was unrelenting. The confirmation process in those years often strayed from examining the qualifications of each nominee into an endeavor to uncover some hidden "liberal" agenda the nominee supposedly harbored. For many Democrats, President Bush's successive terms have been payback time, an opportunity to hold up or reject Bush nominees to the federal judiciary on ideological grounds.

Injecting politics prominently into the nomination or the confirmation process means long delays in filling judicial vacancies, and delay, in the face of mounting caseloads, threatens to erode the quality of justice the U.S. federal judiciary can provide. Vacancies in large numbers inevitably sap the energy and depress the spirits of the judges left to handle heavy dockets.

I should mention, too, the host of jurisdiction-curtailing measures lately placed in the congressional hopper. One bill would have severely limited the scope of federal habeas corpus review.[20] Another would have removed federal courts' authority to decide any case concerning the Ten Commandments, the Pledge of Allegiance, and the National Motto, "In God We Trust."[21] Yet another would have taken away from the federal courts authority to adjudicate free exercise or establishment of religion claims, privacy claims (including those raising "any issue of sexual practices, orientation, or reproduction"), and any claim to equal protection of the laws "based upon the right to marry without regard to sex or sexual orientation."[22]

All these proposals, and other like-minded bills, failed, as students of history could have predicted. Jurisdiction-stripping reactions to disliked decisions have been proposed perennially. In the 1950s, desegregation and domestic-security cases were on some legislators' strip lists; in the 1960s, federal court review of certain criminal justice matters; in the 1970s, busing to achieve racial integration in schools; in the 1980s, abortion and school prayer. None of these efforts succeeded, and most of the more recent endeavors to curb federal court jurisdiction have fared no better. A simple truth has helped to spare the Federal Judiciary from onslaughts of this character: It is easier to block a bill than to get it enacted.

I note, finally, a Congress-Court confrontation proposed in 2004 and revived the next year. The most recent try, titled the "Congressional Accountability for Judicial Activism Act of 2005," would allow U.S. Supreme Court judgments declaring a federal law unconstitutional to be overturned by a two-thirds vote of the House and Senate.[23] (Canada's Charter of Rights and Freedoms, if I recall the "notwithstanding clause" correctly,[24] allows for a legislative override of a Supreme Court

16. Editorial, *supra*, note 8.
17. Theodore B. Olson, *Lay Off Our Judiciary*, WALL ST. J., Apr. 21, 2005, at A16.
18. Federal Judicial Center, Impeachments of Federal Judges, http://www.fjc.gov/history/home.nsf/page/topics_ji_bdy (last visited Aug. 28, 2007).
19. Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1617 n.2 (1994).
20. Streamlined Procedures Act, U.S. 1088, H.R. 3035, 109th Cong. (2005).
21. Safeguarding our Religious Liberties Act, H.R. 4576, § 2, 109th Cong. (2005).
22. We the People Act, H.R. 4379, § 3, 109th Cong. (2005).
23. Congressional Accountability for Judicial Activism Act of 2005, H.R. 3073, § 2, 109th Cong. (2005).
24. Charter of Rights and Freedoms § 33(1).

decision holding a statute incompatible with a Charter-protected right. But the Parliament, is it not so, has yet to avail itself of that prerogative.)

A Constitution providing for legislative override of court decisions resolving constitutional questions, author and journalist Anthony Lewis observed, "would be more democratic in the sense that it would remove constraints on majority rule."[25] But, Lewis rightly reminds us, in the words of Aharon Barak, former president of the Supreme Court of Israel: "'Democracy is not only majority rule. Democracy is also the rule of basic values . . . values upon which the whole democratic structure is built, and which even the majority cannot touch.'"[26] The founders of the United States did not envision a rule of law based on pure majoritarianism,[27] and I see no cause to open the door to a legislative override now.

Particularly since the 2006 election, I am pleased to relate, rapport between Congress and the federal courts has markedly improved. No bills of the kind I have described have been introduced in the current Congress, and one sees far fewer broadsides against "activist judges" reported in the press.

A note on U.S. state courts, whose judges in most states, at least at some levels, are chosen in periodic elections. A question I am often asked when traveling abroad: "Isn't an elected judiciary totally at odds with judicial independence?" How can an elected judge resist doing "what the home crowd wants"? I have no fully satisfactory answers to those questions.

To return to my starting line, when former Chief Justice Rehnquist described an independent judiciary as the USA's hallmark and pride, he was repeating a theme sounded since the United States became a nation. James Madison was perhaps most eloquent on the subject. When he introduced in Congress the amendments that became the Bill of Rights, he said:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[28]

Madison may have put the matter with more force than history confirms, but his basic idea remains vibrant.

It is fitting, I think, to close with the words of two U.S. legal scholars from different ends of the political spectrum—one, Bruce Fein, known for his "conservative perspective," the other, Burt Neuborne, known for his "progressive vision." Though often on opposite sides in debate, they joined together to speak with one voice on the value of judicial independence. Their co-authored essay concludes:

> Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. . . . It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.[29]

To that, I would add only "Amen."

Ruth Bader Ginsburg has been an Associate Justice of the United States Supreme Court since 1993; she was appointed to the Court by President Bill Clinton. She had previously served as a judge on the United States Court of Appeals for the District of Columbia from 1980 to 1993, and she was a law professor at Rutgers University School of Law (1963–1972) and at the Columbia Law School (1972–1980). In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union; she served as the ACLU's general counsel from 1973 to 1980. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School.

25. Anthony Lewis, *Why the Courts*, RECORD, Mar./Apr. 2000, at 178, 181.
26. *Id.* (quoting Aharon Barak, president of the Supreme Court of Israel).
27. *See* THE FEDERALIST No. 51 (James Madison).
28. James Madison, Address to the House of Representatives (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER 224 (Marvin Meyers ed., 1973).
29. Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 64 (2000).

Recent Civil Decisions of the United States Supreme Court:

The 2006-2007 Term

Charles H. Whitebread

The past Term of the Court was one in which it swung to the right. A single justice, Justice Anthony Kennedy, made all the difference—being in the majority in every five-to-four decision that split along ideological lines. Significant 5-4 civil decisions included ones upholding the Partial-Birth Abortion Ban Act of 2003, limiting Title VII pay-discrimination suits by strictly interpreting the date the statute of limitations begins to run, limiting the ability of school districts to consider race in assigning students to schools, and further limiting punitive-damage claims.

FIRST AMENDMENT

In *Davenport v. Washington Education Association*,[1] the Court upheld a state law limiting the use of non-union member fees. Washington State law permits unions and government employers to engage in agency-shop agreements, which allow unions to charge dues to non-union members to "prevent nonmembers from free-riding on the union's efforts." However, Washington law requires authorization by a nonmember before using his fees "to make contributions or expenditures to influence an election or to operate a political committee." The respondent is "the exclusive bargaining agent for approximately 70,000 public educational employees," and in this capacity, it "collected agency fees from nonmembers that it represented in collective bargaining." The State of Washington brought suit against the respondent, as did several nonmembers who paid agency shop fees, claiming its "use of agency fees was in violation of § 760" and that the "respondent had failed to obtain affirmative authorization from nonmembers before using their agency fees for the election-related purposes specified in § 760." The Supreme Court of Washington held that section 760 violated the First Amendment "by imposing on respondent the burden of confirming that a nonmember does not object to the expenditure of his agency fees for electoral purpose" and by "interfer[ing] with respondent's expressive associational rights…." The Court begins by examining the Supreme Court of Washington's reasoning and noting that it reached its holding mostly based on a passage from *Teachers v. Hudson*,[2] which states: "'[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" The Court rejects this line of reasoning because it improperly extends this precedent in assuming "that unions have … constitutional entitlement to the fees of nonmember-employees." Additionally, the Court acknowledges that "content-based regulations of speech are presumptively invalid," but it finds that precedent also establishes "that the government can make content-based distinctions when it subsidizes speech." The Court finds this latter principle applicable to the case at hand because section 760 was concerned with the integrity of the electoral process and was "limited to the state-created harm that the voters sought to remedy."

In *Tennessee Secondary School Athletic Association v. Brentwood Academy*,[3] the Court held that a state-sponsored high-school athletic league's rule prohibiting "undue influence" in recruiting middle-school athletes does not violate the First Amendment. The petitioner, Tennessee Secondary School Athletic Association (TSSAA), regulates sports among numerous private and public high schools in Tennessee, including the respondent: Brentwood Academy. TSSAA prohibits these schools "from using 'undue influence' in recruiting middle school students for their athletic programs." Brentwood Academy's football coach violated this prohibition, and the TSSAA placed sanctions upon Brentwood. Afterwards, Brentwood brought this action against TSSAA, alleging that the prohibition violated the First and Fourteenth Amendments and that TSSAA "deprived the school of due process of law" because of its handling of its appeal. The Court first notes that "Brentwood's speech rights are not absolute" and that "[t]he anti-recruiting rule strikes nowhere near the heart of the First Amendment" because it regulates "direct, personalized communication in a coercive setting" as opposed to "prohibiting appeals to the public at large," a distinction illustrated in *Ohralik v. Ohio State Bar Assn*.[4] In *Ohralik*, the Court held that a state bar association's decision to discipline a lawyer "for the in-person solicitation of clients" does not violate the First Amendment because the "ban was more akin to a conduct regulation than a speech restriction." In examining *Ohralik*, the Court concludes that its "'narrow' holding is limited to conduct that is '"inherently conducive to overreaching and other forms of misconduct."'" The Court believes that this "danger of undue influence … [is] also present when a high school coach contacts an eighth grader" because of the "youthful hopes and fear" involved in the decision whether to play high-school sports at a particular school. Against this background, the Court holds that "TSSAA's limited regulation of recruiting conduct poses no significant First Amendment concerns."

In a narrow decision, the Court held in *Morse v. Frederick*[5] that a high-school principal did not violate the respondent's

Footnotes

1. 127 S. Ct. 2372 (2007).
2. 475 U.S. 292 (1986).
3. 127 S. Ct. 2489 (2007).
4. 436 U.S. 447 (1978).
5. 127 S. Ct. 2618 (2007).

First Amendment rights by requiring him to take down a "BONG HiTS 4 JESUS" banner. The petitioner, Deborah Morse, a high-school principal in Alaska, gave permission to her students, including respondent Joseph Frederick, to miss classes to view the passing of the Olympic Torch Relay. As the torch and camera crews passed, Frederick and several of his friends displayed a 14-foot banner reading: "BONG HiTS 4 JESUS." Thinking the banner "encouraged illegal drug use, in violation of school policy," Principal Morse told the students to take it down, and "[e]veryone but Frederick complied." After confiscating the banner, she suspended Frederick. Frederick argues "that this is not a school speech case." The Court begins by rejecting this argument because the event in question occurred during regular school hours and "was sanctioned by Principal Morse 'as an approved social event or class trip.'" The Court next examines the banner, finding its message to be "cryptic," but agreeing with Morse that it could reasonably be interpreted as advocating the use of illegal drugs. The Court rejects Frederick's argument that he was just trying to get on television because it might explain his motive, but not the content of the sign. In light of its findings, the Court frames the relevant issue as "whether a principal may … restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." The Court finds that its precedent recognizes "that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." The Court holds that in light of "'the special characteristics of the school environment'" and the drug-use problem in schools, school officials may "restrict student expression that they reasonably regard as promoting illegal drug use." The Court states that Morse acted reasonably in believing that the banner promoted the use of illegal drugs and feels "that failing to act would send a powerful message to the students … about how serious the school was about the dangers of illegal drug use." Given its holding, the Court does not reach the issue of qualified immunity.

In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[6] a 5-4 Court held that the Bipartisan Campaign Reform Act of 2002 (BCRA) is unconstitutional as applied to respondent's issue-focused advertisements because the FEC cannot demonstrate that the statute's ban on these ads is narrowly tailored to further a compelling interest. The BCRA makes it a crime for a corporation to use company funds for any "'electioneering communication,'" which includes "any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office." In 2004, the respondent, Wisconsin Right to Life, Inc. (WRTL), planned to air three television and radio commercials arguing against a Senate filibuster and encouraging viewers to "'[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.'" WRTL realized that its planned airing would violate BCRA section 203 and filed suit against the Federal Election Commission (FEC) seeking declaratory and injunctive relief. The Court first addresses the FEC's argument that "these cases are moot because the 2004 election has passed …." The Court disagrees because the WRTL reasonably expects to run "'materially similar'" ads in the future, and "there is no reason to believe that the FEC will 'refrain from prosecuting violations.'" The Court next turns to the First Amendment issues presented, stating that "[b]ecause § 203 burdens political speech, it is subject to strict scrutiny" and "the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest." Because *McConnell v. Federal Election Com'n*[7] already upheld BCRA "to the extent it regulates express advocacy or its functional equivalent," the Court states that if the ads in this case fall into these categories, the FEC has proven its case. However, if they do not, the FEC must meet the more difficult standard above. To help this determination, the Court adopts an objective test, holding that "a court should find an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court concludes that WRTL's ads "are plainly not the functional equivalent of express advocacy" because they "focus on a legislative issue, take a position on that issue, … and … do not mention an election, candidacy, political party, or challenger …." The Court next applies the "narrowly tailored to further a compelling interest" standard. Citing *Buckley v. Valeo*,[8] the Court notes its long recognition of "'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns." However, the Court sees no reason for extending speech limitations outside the context of campaign speech and concludes that the regulation of corporate campaign speech "has no application to issue advocacy of the sort engaged in by WRTL."

[A] 5-4 Court held that the Bipartisan Campaign Reform Act of 2002 is unconstitutional as applied . . . to issue-focused advertisements . . . .

In *Hein v. Freedom from Religion Foundation, Inc.*,[9] a split Court held that respondents, as taxpayers, lack standing under Article III to challenge the executive branch's organization of conferences allegedly promoting religion. In 2001, President Bush formed the White House Office of Faith-Based and Community Initiatives to "ensure that 'private and charitable community groups, including religious ones … have the fullest opportunity permitted by law to compete on a level playing field….'" Congress did not enact legislation promoting the Office or any of the related centers, and the money for them comes solely from "general Executive Branch appropriations." The respondents, Freedom from Religion Foundation, Inc., and three of its members, filed suit in federal court, arguing

6. 127 S. Ct. 2652 (2007).
7. 540 U.S. 93 (2003).
8. 424 U.S. 1 (1976).
9. 127 S. Ct. 2553 (2007).

[A] 5-4 Court . . . held that the Constitution requires some procedural method for ensuring that juries do not use punitive damages to punish . . . for harm caused to nonparties.

that the petitioners violated the Establishment Clause of the Constitution by organizing conferences that were allegedly "designed to promote, and had the effect of promoting, religious groups over secular ones." Justice Alito announced the judgment of the Court and delivered an opinion, in which Chief Justice Roberts and Justice Kennedy joined. He begins by noting that under Establishment Clause precedent, parties cannot challenge laws of general application unless they have been personally injured, and generally "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." He notes that *Flast v. Cohen*[10] created a "narrow exception" to this principle but requires a taxpayer to establish: (1) a "'logical link between the status and the type of legislative enactment attacked;'" and (2) "'a nexus between the status and the precise nature of the constitutional infringement alleged.'" The respondents argue that *Flast* should govern the present case. Justice Alito finds the requisite link does not exist in the present case because the respondents do not challenge any specific congressional appropriation and the expenditures at issue "resulted from executive discretion, not congressional action." Justice Alito also rejects the respondents' position because he feels that without a distinction between executive and congressional spending, almost "every federal action" would be subject to an Establishment Clause challenge. Justice Alito further notes that the respondents have failed to supply a "workable limitation" on such challenges if *Flast* were extended to govern their case.

FOURTEENTH AMENDMENT

In *Philip Morris USA v. Williams*,[11] a 5-4 Court, in an opinion written by Justice Breyer, held that the Constitution requires some procedural method for ensuring that juries do not use punitive damages to punish a defendant for harm caused to nonparties. The respondent, the widow of Jesse Williams, filed a lawsuit against Philip Morris for negligence and deceit. A jury found that Williams's death resulted from smoking Marlboro cigarettes and that Philip Morris led him to believe smoking was safe. The jury awarded respondent $821,000 on the deceit claim and $79.5 million in punitive damages. On review, Philip Morris argued that the trial court erred in rejecting a jury instruction regarding punitive damages "that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court." Philip Morris also argued that the approximately 100-to-1 ratio between the punitive damages and compensatory damages was unreasonable under *BMW of North America, Inc. v. Gore*.[12] The Court granted certiorari on two questions: (1) whether "Oregon had unconstitutionally permitted [Philip Morris] to be punished for harming nonparty victims;" and (2) "whether Oregon had in effect disregarded 'the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.'" The Court focuses its analysis on the Due Process Clause, finding that it "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent." Therefore, states must "provide assurance that juries are not … seeking … to punish for harm caused strangers." The respondent argues that the Oregon Supreme Court understood this and did not allow punitive damages against nonparties. The Court agrees that some sections of the Oregon Supreme Court's opinion focus "only upon reprehensibility" but concludes that that court erred in affirming the Oregon Court of Appeals' decision because it did not allow any form of protection against the jury awarding punitive damages for injuries to nonparties.

CIVIL RIGHTS

In *Wallace v. Kato*,[13] a 7-2 Court held that a cause of action for a claim of false imprisonment under 42 U.S.C. section 1983 begins at the time the prisoner is subjected to legal process. The petitioner Andrew Wallace was picked up by police officers in Chicago on January 19, 1994, two days after John Handy was shot to death. He was taken to the police station around 8 p.m. and interrogated until the early morning of the following day, when he agreed to confess to Handy's murder. The petitioner was convicted of first-degree murder at trial and sentenced to 26 years in prison. The Appellate Court of Illinois reversed the conviction because officers had no probable cause when arresting petitioner, a violation of the Fourth Amendment. The prosecutors subsequently dropped all charges against petitioner on April 10, 2002. On April 2, 2003, the petitioner filed suit against the city of Chicago and several police officers under 42 U.S.C. section 1983 for damages arising from his unlawful arrest. The District Court granted respondents' motion for summary judgment, and the Seventh Circuit affirmed, finding the suit barred under the applicable statute of limitations because the petitioner's "cause of action accrued at the time of his arrest, not when his conviction was later set aside." The Court begins by noting that both sides agree that the correct statute of limitations is two years, but they contest when the petitioner's cause of action began. The Court finds that the tort of false imprisonment is analogous to the petitioner's claim because "the sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." Because the statute of limitations on false imprisonment claims begins to run "'when the alleged false imprisonment ends,'" the Court must decide when the petitioner's false imprisonment ended. The Court holds that false

10. 392 U.S. 83 (1968).
11. 127 S. Ct. 1057 (2007).
12. 517 U.S. 559 (1996).
13. 127 S. Ct. 1091 (2007).

Office Resources

Full Page

[A] 5-4 Court held that two . . . student distribution plans are unconstitutional [because] they rely solely upon race as a determinative factor.

imprisonment ends "once the victim becomes held pursuant" to legal process and that any claim after this point would be for malicious prosecution. Therefore, the Court concludes that the petitioner's cause of action began "when he appeared before the examining magistrate and was bound over for trial," and the two-year limitations period has run.

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[14] a 5-4 Court held that petitioner's sex-discrimination claims based on pay decisions made prior to the 180-day period required by Title VII of the Civil Rights Act were time barred. The petitioner Lilly Ledbetter was employed by the respondent Goodyear Tire and Rubber Company, and she filed a questionnaire and a formal charge of sex discrimination in 1998 with the Equal Employment Opportunity Commission (EEOC). Later the same year, after retiring, the petitioner began this action, asserting "a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA)." A jury awarded her backpay and damages. On appeal to the Eleventh Circuit, Goodyear claimed that the petitioner's claim "was time barred with respect to all pay decisions made prior to … 180 days before the filing of her EEOC questionnaire" and that "no discriminatory act relating to Ledbetter's pay occurred after that date." The Eleventh Circuit agreed and reversed the lower court's decision. The Court begins by examining Title VII, which requires an employee seeking to challenge an allegedly discriminatory practice to "file a charge with the EEOC … within a specified period (either 180 or 300 days, depending on the State) 'after the alleged unlawful employment practice occurred.'" The petitioner argues that each paycheck she received "was a separate act of discrimination," and, alternatively, that a 1998 evaluation with no raise was "'unlawful because it carried forward intentionally discriminatory disparities from prior years.'" The Court rejects both these arguments because the petitioner does not allege that Goodyear had discriminatory intent during either of these acts, but only "*prior to* the EEOC charging period." The Court notes that *United Air Lines, Inc. v. Evans*[15] held that "the continuing effects of the precharging period discrimination did not make out a present violation." The Court also cites *Lorance v. AT&T Technologies, Inc.*,[16] which held "that the … charging period ran from the time when the discrete act … occurred, not from the date when the effects of this practice were felt." Based on these decisions, the Court finds that "[a] new violation does not occur … upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination." The Court concludes that the petitioner's claim of continuing effects of past discrimination is inconsistent with these decisions.

In *Parents Involved in Community Schools v. Seattle School District No 1.*,[17] a 5-4 Court held that two school-district student-distribution plans are unconstitutional to the extent that they rely solely upon race as a determinative factor. In 1998, the respondent Seattle School District No. 1 implemented a new student-distribution plan. If a school is "not within 10 percentage points of the district's" 41% white and 59% "nonwhite" balance, the district will select for "students whose race 'will serve to bring the school into balance.'" The petitioner, Parents Involved in Community Schools, sued in District Court, alleging that the system violated the Equal Protection Clause. In 2001, the respondent Jefferson County adopted a program under which all nonmagnet schools must maintain a minimum 15% and a maximum 50% black enrollment. The petitioner Crystal Meredith applied to transfer her son to a school only one mile from her home but was denied because it "'would have an adverse effect on desegregation compliance.'" The petitioner brought suit, alleging violations of the Equal Protection Clause. The Court first notes that racial classification plans must be "'narrowly tailored' to achieve a 'compelling' government interest.'" The Court has recognized two compelling interests in the context of racial classifications: (1) "remedying the effects of past intentional discrimination"; and (2) promoting "diversity in higher education." The Court finds that the first applies in neither case. The second compelling interest was outlined in *Grutter v. Bollinger*,[18] which reiterated that "'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race.'" *Grutter* upheld a law-school admissions process that took race into account to achieve diversity. In contrast to the system in *Grutter*, the Court finds that in those at issue here, race "is not simply one factor weighed with others in reaching a decision …; it is *the* factor." The Court also feels that unlike the system in *Grutter*, those in the instant cases "employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County." The respondents offer two other possible compelling interests: (1) race classifications "[help] to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools"; and (2) schools have an interest in "educating … students 'in a racially integrated environment'" because "education and broader socialization benefits flow from a racially diverse learning environment." The Court rejects these interests because they are "not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity" and because this type of "'outright racial balancing'" would "'assur[e] that race will always be relevant in American life, and that the "ultimate goal" of "eliminating

14. 127 S. Ct. 2162 (2007).
15. 431 U.C. 553 (1977).
16. 490 U.S. 900 (1989).
17. 127 S. Ct. 2738 (2007).
18. 539 U.S. 306 (2003).

entirely from governmental decisionmaking such irrelevant factors as a human being's race" will never be achieved.'" The Court also finds that the "minimal impact [of the programs] … casts doubt upon the necessity of using racial classifications." Lastly, the Court rejects the arguments in Justice Breyer's lengthy dissent as a misunderstanding and misapplication of its precedent. The Court concludes that "[t]he way to stop discrimination on the basis of race is to stop discrimination on the basis of race."

FEDERALISM

In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[19] a divided Court held that flow-control ordinances benefiting a public enterprise do not violate the dormant Commerce Clause because they do not discriminate against interstate commerce. The two respondent counties involved in this case have traditionally disposed of their own waste, but "[b]y the 1980's, the Counties confronted … a solid waste 'crisis.'" In response, they requested the creation of respondent Oneida-Herkimer Solid Waste Management Authority (Authority), and New York's legislature obliged. Under an agreement between the counties and the Authority, "private haulers would remain free to pick up citizens' trash…, but the Authority would take over the job of processing the trash, sorting it, and sending it off for disposal." The counties used "flow control ordinances" mandating that "all solid waste generated within the Counties be delivered to the Authority's processing sites." To cover its expenses, the Authority collected "tipping fees" that "significantly exceeded those charged for waste removal on the open market." The petitioners represent six private waste haulers that operated in the counties. In 1995, they sued the respondents, "alleging that the flow control laws violate the Commerce Clause by discriminating against interstate commerce." The petitioners submitted evidence that the market price for disposing of waste was between $37 and $55 per ton, while the Authority's tipping fee was $86 per ton. The Court begins by laying out the dormant Commerce Clause test, which requires the Court to "first ask whether [a law] discriminates on its face against interstate commerce." Those discriminatory laws that are "motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity' … which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." In analyzing the ordinances, the Court states that "it does not make any sense to regard laws favoring local government and laws favoring private industry with equal skepticism" in that "laws favoring local government … may be directed toward any number of legitimate goals" while laws favoring in-state business are "often the product of 'simple economic protectionism.'" Finding that the flow-control ordinances "benefit a clearly public facility, while treating all private companies exactly the same," the Court holds that they "do not discriminate against interstate commerce." The Court next applies the test established in *Pike v. Bruce Church, Inc.*,[20] which states that the Court "will uphold a nondiscriminatory statute like this one 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Because "both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses," the Court concludes that "any arguable burden does not exceed the public benefits of the ordinances."

[T]he Court held that the Individuals with Disabilities Education Act affords parents independent rights to prosecute related claims . . . on their own behalf.

CIVIL STATUTORY INTERPRETATION

In *Winkelman v. Parma City School District*,[21] the Court held that the Individuals with Disabilities Education Act (IDEA) affords parents independent rights to prosecute related claims, and they may do so on their own behalf. The petitioner Jacob Winkelman, represented by his parents, is a child with autism spectrum disorder. The respondent Parma City School District participates in IDEA's education-spending program and "accepts federal funds for assistance in the education of children with disabilities." These funds are conditioned on the school structuring, with the participation of Jacob's parents, an individualized education program (IEP) for Jacob. Jacob's parents disagreed with the school's proposed IEP for the 2003-2004 school term and sought administrative review. A hearing officer rejected their claims, and they appealed to a state-level review officer. After the review officer affirmed the hearing officer's decision, the petitioners "on their own behalf and on behalf of Jacob," filed a complaint, "without the aid of an attorney," in federal court, where it was rejected. The petitioners appealed this decision, and the Sixth Circuit, "[r]elying on its recent decision in *Cavanaugh v. Cardinal Local School Dist.*,[22] … entered an order dismissing the appeal unless petitioners obtained counsel to represent Jacob." *Cavanaugh* held that in the IDEA context, the "right to a free appropriate public education 'belongs to the child alone'" and parents rights are "'derivative' of the child's right." The *Cavanaugh* court concluded that because IDEA "does not abrogate the common-law rule prohibiting nonlawyer parents from representing minor children," parents cannot proceed *pro se* with IDEA litigation in federal court. The Court first notes that several provisions of IDEA guarantee parents "protections that apply throughout the IEP process" and another requires the local education agency to "'resolv[e] … complaint[s] to the satisfaction of the parents.'" The Court also finds that IDEA "sets forth procedures … that, in the Act's express terms, contemplates parents will be the parties bringing the … complaints." Because "parents enjoy enforceable rights at the administrative stage," the

19. 127 S. Ct. 1786 (2007).
20. 397 U.S. 137 (1970).
21. 127 S. Ct. 1994 (2007).
22. 409 F. 3d 753 (2005).

[A] 5-4 Court upheld the Partial-Birth Abortion Ban Act of 2003.

Court holds that "it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court." The Court rejects the respondent's alternative interpretation of the statute and concludes that because parents have independent rights under IDEA, "they are … entitled to prosecute IDEA claims on their own behalf." Therefore, the Court "need not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se*."

In *Sole v. Wyner*,[23] a unanimous Court held that the respondent is not entitled to an award of attorney's fees because a plaintiff who wins a preliminary injunction but later loses the same case on the merits is not a prevailing party. The respondent T.A. Wyner filed suit against the petitioners, including the Secretary of Florida's Department of Environmental Protection (DEP). She alleged that Florida's "Bathing Suit Rule," which requires that patrons in Florida's state parks "wear at a minimum, a thong and, if female, a bikini top," violated her First Amendment right to engage in artwork that "would consist of nude individuals assembled into a peace sign." The District Court granted respondent a preliminary injunction and allowed the DEP to put up a screen, behind which the exhibit would take place. However, "the display was set up outside the barrier, and participants, once disassembled from the peace symbol formation, went into the water in the nude." After this occurrence, the trial continued and respondent sought a permanent injunction because she intended to stage a repeat exhibit the next year. The District Court granted petitioner's motion for summary final judgment, holding that "[t]he deliberate failure of Wyner and her coparticipants to remain behind the screen at the 2003 … display … demonstrated that the Bathing Suit Rule's prohibition of nudity was 'no greater than is essential….'" Despite its ruling, the District Court held that Wyner had prevailing-party status because she initially obtained the preliminary injunction. Under 42 U.S.C. section 1988(b), Congress gave federal district courts discretion to "'allow the prevailing party … a reasonable attorney's fee as part of the costs.'" Accordingly, the District Court "awarded [respondent] counsel fees covering the first phase of the litigation." The Court begins by examining the definition of a "prevailing party." The Court finds that in the case at hand, "the preliminary injunction hearing was necessarily hasty and abbreviated" and that the relief "expired before appellate review could be gained." In this context, the Court holds that "[t]he final decision in Wyner's case rejected the same claim she advanced in her preliminary injunction motion" and that "her initial victory was ephemeral." Therefore, the Court concludes "that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under §1988(b) if the merits of the case are ultimately decided against her."

In *Watson v. Philip Morris Companies, Inc.*,[24] a unanimous Court held that mere compliance with federal agency regulations, even where an agency closely monitors activities, is not "acting under" the government for purposes of the federal officer removal statute. The petitioners filed suit in state court against the respondent Philip Morris Companies for allegedly engaging in "unfair and deceptive business practices" in advertising certain cigarettes as light. The complaint accuses the respondent of manipulating its cigarettes' performance in the tobacco industry's Cambridge Filter Method tests "'to register lower levels of tar and nicotine … than would be delivered to the consumers of the product.'" The respondent removed the case to Federal District Court under the federal officer removal statute, which allows the removal of suits against the "United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof …." The petitioner argues that the removal is invalid. The Court begins its opinion by addressing the extensive history surrounding the federal officer removal statute. After analyzing this background, the Court concludes that the statute "was '[o]bviously … an attempt to protect federal officers from interference by hostile state courts.'" Turning to the pertinent language, the Court finds that "[t]he relevant relationship is that of a private person '*acting under*' a federal 'officer' or 'agency'" and that the plain meaning of this "relationship typically involves 'subjection, guidance, or control.'" The Court reasons that "simply *complying* with the law" does not fall under this phrase and would not normally trigger the threat of state court prejudice that the statute was designed to protect against. The Court holds that "a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone, … even if the private firm's activities are highly supervised and monitored." Philip Morris contends that in conducting the cigarette tests, it did more than merely comply with Government regulations but was acting under "'*delegated authority*'" from the FTC. The Court points out that no official delegation of legal authority was ever made from the FTC to the tobacco industry "to undertake testing on the Government agency's behalf." The Court concludes that it "can find nothing that warrants treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship" and that this relationship alone "cannot be construed as bringing Philip Morris within the terms of the statute."

ABORTION

In *Gonzales v. Carhart*,[25] a 5-4 Court upheld the Partial-Birth Abortion Ban Act of 2003. Congress passed the Act in response to *Stenberg v. Carhart*.[26] In *Stenberg*, the Court invalidated a state ban on certain abortion procedures used in later stages of pregnancy. While the laws at issue are similar, the language of the Act is "more precise in its coverage" than the *Stenberg* statute and was supported by factual findings from Congress. The Act provides in pertinent part that "'[a]ny physician who, in or affecting interstate or foreign commerce,

23. 127 S. Ct. 2188 (2007).
24. 127 S. Ct. 2301 (2007).
25. 127 S. Ct. 1610 (2007).
26. 530 U.S. 914 (2000).

knowingly performs a partial-birth abortion … shall be fined under this title or imprisoned not more than 2 years, or both.'" The term "partial-birth abortion" is defined as a procedure in which a physician: "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus." The respondents filed suit in federal court against the Attorney General of the United States and were awarded permanent injunctions barring enforcement of the Act in most situations. The Court begins by discussing the abortion procedures at issue. The usual method for abortion during the second trimester is dilation and evacuation (D&E), and in a normal D&E procedure, the doctor will dilate the cervix and insert forceps to grab the fetus and "[pull] it back through the cervix and vagina." The numerous acts banning partial-birth abortions were motivated by a variation on this procedure known as intact D&E. Intact D&E is similar to regular D&E, but the goal is that the fetus remains whole. Normally, the "fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass." Doctors next use various methods to evacuate the skull contents and crush the skull to allow it to pass. The Court reviews its holdings in *Roe v. Wade*[27] and *Planned Parenthood of Southeastern Pa. v. Casey*[28] and finds that *Casey* allows "'[r]egulations … by which the State, … express[es] profound respect for the life of the unborn …, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" The respondents assert that "the Act is void for vagueness" and alternatively that "the Act's text proscribes all D&Es," thereby imposing an undue burden. The Court finds the Act not void for vagueness because it clearly requires a doctor to vaginally deliver a fetus to an anatomical landmark, perform an overt act to kill the partially delivered fetus, and have the requisite scienter in performing this act for a violation to occur. The Court also rejects the respondents' undue-burden argument because the Act only prohibits intact D&Es and intent is required. Next, the Court addresses whether the Act is unconstitutional because its "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion….'" The Court finds that it is reasonable for Congress to determine that "the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant'" and that the Act "furthers the Government's objectives." The Court acknowledges that the Act would be unconstitutional if it "'subject[ed] [women] to significant health risks'" but states that the record shows a "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women" and that this disagreement is not sufficient to demonstrate sufficient health risks. The Court concludes by noting that the Act might still be open to a proper as-applied challenge but that the facial challenges at issue will not invalidate it.

BUSINESS LAW

[A] 7-1 Court held that securities law precludes the application of antitrust law to alleged anticompetitive activities during the marketing of IPOs . . . .

In *Credit Suisse Securities (USA) LLC v. Billing*,[29] a 7-1 Court held that securities law precludes the application of antitrust law to alleged anticompetitive activities during the marketing of IPOs because it is "clearly incompatible" with antitrust law. The petitioners are underwriters who facilitate an initial public offering (IPO) of shares in a company. In doing so, they engage in "book building" by interviewing potential investors to determine the price and quantity of shares to be offered. After this process, the petitioners discuss arrangements for the offering with the offering company and then buy shares at a discounted price, which the petitioner resells to investors at the price determined through book building, "in effect earning its commission in the process." The petitioners were sued by the respondents, a group of 60 investors, for actions during this process, which respondents allege violated various federal and state antitrust laws, including section 1 of the Sherman Act. The petitioners seek to dismiss the complaint "on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question." The Court first states that the relevant issue is "whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint—or … whether the two are 'clearly incompatible.'" Four factors are critical in this determination: "(1) the existence of regulatory authority under the securities law to supervise the activities in question;" (2) a showing that the regulator "exercise[s] that authority;" (3) a risk of conflict between the two statutes if both were followed; and (4) the presence of "practices that lie squarely within an area of financial market activity that the securities law seeks to regulate." The Court finds that the fourth factor is present because "the activities in question here … [are] central to the proper functioning of well-regulated capital markets." The Court also finds that the first and second factors are met because the SEC has "authority to supervise all of the activities here in question" and "has continuously exercised its legal authority to regulate" this conduct. The central issue is the third factor: whether there is "a conflict that rises to the level of incompatibility." The Court believes that "there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target…" and that antitrust courts "are likely to make unusually serious mistakes in this respect." Also, the Court finds that "any enforcement-related need for an antitrust lawsuit is unusually small" because the SEC enforces its rules, and investors can challenge activities and receive damages under relevant securities law. Because the four requisite ele-

27. 410 U.S. 113 (1973).
28. 505 U.S. 833 (1992).
29. 127 S. Ct. 2383 (2007).

[T]he Court held that the Fair Credit Reporting Act's adverse-action notice requirement only applies when an action is willful or reckless. . . .

ments are present, the Court concludes that "securities laws are 'clearly incompatible' with the application of the antitrust laws in this context."

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[30] an 8-1 Court held that the "strong inference" standard in the Private Securities Litigation Reform Act of 1995 (PSLRA) requires a plaintiff to allege in his or her complaint "facts rendering an inference of scienter *at least as likely as* any plausible opposing inference." Congress passed the PSLRA to "check against abusive litigation by private parties" within the securities context. The plaintiffs are required to "'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" The respondents are shareholders who purchased stock in the petitioner Tellabs, Inc., in 2000 and 2001. They allege that during this period, the petitioner Richard Notebaert, acting as CEO and president of Tellabs, "knowingly misled the public" with false statements and representations regarding the company. By 2001, evidence of the company's troubles came to light, and the stock price dropped significantly. The respondents filed a class-action lawsuit in 2002. On appeal, the Seventh Circuit held that the "strong inference" requirement is met if a complaint "'alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent ….'" The Supreme Court granted certiorari to resolve a conflict among the Circuit Courts of Appeals in interpreting this requirement. The Court first notes that the PSLRA was partially intended to resolve a split among the circuits regarding the correct standard for pleading requirements of scienter in a private party's securities-related action. The Court concludes that it must "prescribe a workable construction of the 'strong inference' standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." To this end, the Court states three prescriptions: (1) when deciding a motion to dismiss, courts must accept the complaint's alleged facts as true; (2) courts must examine the complaint and referenced documents in their entirety; and (3) in applying the "strong inference" standard, courts "must take into account plausible opposing inferences." In reaching the third prescription, the Court rejects the Seventh Circuit's standard because the PSLRA does not require plaintiffs "to allege facts from which an inference of scienter rationally *could* be drawn" but more specifically "require[s] plaintiffs to plead with particularity facts that give rise to a 'strong'—*i.e.*, a powerful or cogent—inference." The Court holds that "[a] complaint will survive … only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." In conclusion, the Court rejects the Seventh Circuit's standard, but "do[es] not decide whether … [respondents'] allegations warrant 'a strong inference that [Notebaert and Tellabs] acted with the required state of mind ….'"

In *Safeco Insurance Co. of America v. Burr*,[31] the Court held that the Fair Credit Reporting Act's (FCRA) adverse-action notice requirement only applies when an action is willful or reckless and only if the proposed premium rate is above a "neutral" rate that would apply regardless of the consumer's credit report. The FCRA requires that "'any person [who] takes any adverse action with respect to any consumer that is based … on any information contained in a consumer [credit] report' must notify the affected customer." If a breach of the statute is willful, a consumer can be awarded actual or statutory damages, and possibly punitive damages. The respondent Ajene Edo applied for auto insurance from the petitioner GEICO, who obtained his credit score and offered him a "standard policy … (at rates higher than the most favorable), which he accepted." Under GEICO's tiered scheme, Edo was not offered a "preferred policy," but the standard policy offered was no different from the "neutral" rate he would have received without consideration of his credit report. GEICO did not send Edo an adverse-action notice. Edo brought suit alleging a willful failure to give notice and seeking statutory and punitive damages. The respondents Charles Burr and Shannon Massey were similarly offered higher rates from the petitioner Safeco, who based these premiums partially on their credit reports. After Safeco failed to send adverse-action notices, the respondents joined a class action against Safeco. The Court first examines the definition of "willful" under FCRA and finds that under common usage, it includes "reckless disregard." The Court next addresses the initial issue of "whether either company violated the adverse action requirement at all." Under FCRA, an adverse action can only occur in these circumstances if "quoting or charging a first-time premium is 'an increase in any charge for … any insurance….'" The Court holds that "the 'increase' required for 'adverse action'… speaks to a disadvantageous rate even with no prior dealing." Additionally, the Court accepts GEICO's argument "that in order to have adverse action 'based on' a credit report, consideration of the report must be a necessary precondition for the increased rate." In light of these findings, the Court states that it must identify "the benchmark for determining whether a first-time rate is a disadvantageous increase." GEICO argues that the baseline should be the neutral rate obtained by not taking an applicant's credit score into account at all. The Court agrees because it feels GEICO's proposed definition is more in keeping with the "based on" causation requirement discussed above. The Court holds that because "the initial rate offered to Edo was the one he would have received if his credit score had not been taken into account," GEICO was not required to send an adverse-action notice. With regard to Safeco, the Court finds that the insurer understood the adverse-action notice requirement as not applying to initial applications for insurance. The Court holds that because it is clear from the record

30. 127 S. Ct. 2499 (2007).

31. 127 S. Ct. 2201 (2007).

that Safeco did not act recklessly or willfully in this misinterpretation of FCRA, it cannot be liable even if its actions otherwise meet the "adverse action" requirement.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[32] a 5-4 Court held that vertical price restraints should be judged under the Sherman Act by the rule of reason and not by a *per se* rule of illegality. The petitioner, Leegin Creative Leather Products, Inc., is a manufacturer of leather goods and accessories. The respondent, PSKS, Inc., sold the petitioner's goods in its retail establishment Kay's Kloset beginning in 1995. In 1997, the petitioner began a program under which it "refused to sell to retailers that discounted [its] goods below suggested prices." In 2002, the petitioner learned that Kay's Kloset had violated the policy and asked the respondent to stop. After it refused, the petitioner stopped selling to Kay's Kloset. The Respondent sued, alleging that the petitioner had violated antitrust laws. The Court begins by examining section 1 of the Sherman Act, which prohibits "'[e]very contract … in restraint of trade or commerce among the several states.'" The Court notes that this has never applied literally, but only to "'unreasonable restraints'" and that the reasonableness of a particular contract is usually determined by applying the rule of reason, under which "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" However, some practices are governed by a *per se* rule of illegality because they "'would always or almost always tend to restrict competition and decrease output.'" For example, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[33] has been interpreted as "establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices." The Court finds that recent cases have rejected the "'formalistic'" reasoning of *Dr. Miles* in favor an evaluation of "'demonstrable economic effect'" and concludes that the *Dr. Miles* opinion is insufficient to justify a *per se* rule. In undertaking its own evaluation, the Court finds that in light of the opposing viewpoints of economists on the subject, "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" For this reason, the Court states that "were [it] considering the issue as an original matter," it would apply the rule of reason to vertical price restraints. The Court next examines the doctrine of *stare decisis*, noting that it is weakened in the context of the Sherman Act because "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute," making it more adaptable to "modern understanding and greater experience." In addition, the Court finds that subsequent decisions have weakened *Dr. Miles*'s "'doctrinal underpinnings.'" Therefore, the Court overrules *Dr. Miles* and holds that vertical price restraints should be evaluated under the rule of reason.

[A] 5-4 Court held that vertical price restraints should be judged under the Sherman Act by the rule of reason and not by a *per se* rule of illegality.

INTELLECTUAL PROPERTY

In *KSR Intern. Co. v. Teleflex Inc.*,[34] a unanimous Court held that the respondent's patent on an electronic pedal sensor is void for obviousness because it can be derived by a person of ordinary skill from previous patents. In 1999, the petitioner KSR International Company patented an "adjustable pedal system for various lines of automobiles with cable-actuated throttle controls." When KSR was hired by General Motors Corporation to manufacture pedals, it "added a modular sensor" to its previous design to ensure compatibility. The respondent Teleflex Incorporated sued KSR for infringing upon its Engelgau patent. Claim 4 of the Engelgau patent "describes a mechanism for combining an electronic sensor with an adjustable automobile pedal so the pedal's position can be transmitted to a computer that controls the throttle in the vehicle's engine." KSR argued that claim 4's content is obvious and that the patent is invalid under the Patent Act, 35 U.S.C. section 103, which "forbids issuance of a patent" if "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." The District Court found "'little difference'" between the prior art and the Engelgau patent and concluded that claim 4 was obvious. However, the "District Court was not permitted to stop there" because the Federal Circuit applies a "'teaching, suggestion, or motivation' test (TSM test)." Under the TSM test, a patent claim can be obvious only if "'some motivation or suggestion to combine the prior art teachings' can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art." The District Court concluded that KSR satisfied this test and granted its motion for summary judgment. The Federal Circuit Court of Appeals reversed, holding that "the District Court had not been strict enough in applying" the TSM test. The Court "begin[s] by rejecting the rigid approach of the Court of Appeals" because its previous "cases have set forth an expansive and flexible approach." The Court next examines the TSM test, agreeing that "it can be important to identify a reason that would have prompted a person … to combine the elements," but finding that "obviousness analysis cannot be confined" to such a formalistic test. The Court finds the Federal Circuit erred "by holding that courts and patent examiners should look only to the problem the patentee was trying to solve" because the correct inquiry is whether it was obvious to a person of ordinary skill, not the individual patentee. The Court agrees with the District Court's finding that there is little difference between the combination of previous patents and the Engelgau patent, and "a person having ordinary skill in the art could have combined [a previous patent]

32. 127 S. Ct. 2705 (2007).
33. 220 U.S. 373 (1911).
34. 127 S. Ct. 1727 (2007).

[A] 5-4 Court held that the Clean Air Act requires the EPA to issue regulations governing new vehicle emissions of greenhouse gases.

with a pedal position sensor in a fashion encompassed by claim 4, and would have seen the benefits of doing so." Therefore, the Court concludes claim 4 is obvious.

In *Microsoft Corp. v. AT&T Corp.*,[35] a 7-1 Court held that Microsoft is not liable for overseas patent infringement because sending a master version of software overseas is not supplying a component from the United States under section 271(f) of the Patent Act of 1984. Generally, a patent infringement does not occur "when a patented product is made and sold in another country." However, section 271(f) of the Patent Act of 1984 contains an exception to this rule "when one 'supplies … from the United States,' for 'combination' abroad, a patented invention's 'components.'" The respondent AT&T holds a patent on a device used "for digitally encoding and compressing recorded speech" and the petitioner Microsoft's Windows software "has the potential to infringe AT&T's patent, because Windows incorporates software code that, when installed, enable a computer to process speech" in this manner. Microsoft sells master versions of Windows to overseas manufacturers of computers who copy this master version and install these copies onto their products. In 2001, AT&T sued Microsoft in federal court for infringing its patent as a result of these foreign installations of Windows. Microsoft argues that the master versions sold were not "'supplie[d] … from the United States" and were not "'component[s]'" covered under section 271(f). The Court begins by stating the two issues to be addressed: (1) "[W]hen … does software qualify as a 'component' under §271(f)"; and (2) "[W]ere 'components' of the foreign-made computers involved in this case 'supplie[d]' by Microsoft 'from the United States'?" Turning to the first question, the Court finds that Windows software in the abstract cannot be combined to infringe on AT&T's patent but must be installed from "a computer-readable 'copy'" in order to do so. Therefore, the Court concludes that uninstalled Windows software is not a component within the meaning of section 271(f). Next, the Court examines the question of whether components were supplied from the United States. The Court notes that "the copies of Windows actually installed on the foreign computers were not themselves supplied from the Unites States" but were "generated by third parties outside the United States." Because section 271(f) is silent on the issue of copying, the Court concludes that this "weighs against a judicial determination that replication abroad of a master dispatched from the United States 'supplies' the foreign-made copies from the United States."

ENVIRONMENTAL LAW

In *Massachusetts v. E.P.A.*,[36] a 5-4 Court held that the Clean Air Act requires the Environmental Protection Agency (EPA) to issue regulations governing new-vehicle emissions of greenhouse gases. Under section 202(a)(1) of the Clean Air Act, the EPA is required to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles, which … cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare …." In 1999, several private organizations petitioned the EPA to regulate "'greenhouse gas emissions from new motor vehicles under §202,'" arguing that these gases have "accelerated climate change." In 2003, the EPA denied the organizations' petition, stating that "the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change" and that even if it did, "it would be unwise to do so at this time." The organizations were joined by several states and local governments and sought review of EPA's denial. The Court begins by addressing the issue of standing because at least one petitioner must demonstrate the requirements of injury, causation, and remedy. Using Massachusetts as an example, the Court finds the first requirement met because the injuries "associated with climate change are serious and well recognized." With regard to the second, the Court finds that a reduction in auto emissions could be a significant step in battling global warming. Turning to the remedy requirement, the Court finds that the EPA's actions could "slow the pace of global emissions increases, no matter what happens elsewhere." Because all three requirements are met, Massachusetts has standing to challenge the EPA's decision. Turning to the merits of the case, the Court finds that greenhouse gases are air pollutants within the Act's broad definition and that the EPA has the authority to regulate greenhouse-gas emissions from new vehicles. Finally, the Court addresses the EPA's alternative argument that even if it has this authority, "it would be unwise to do so at this time." While recognizing that the EPA has some discretion under the statute, the Court states that it "can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion." Because the EPA has not met these requirements, the Court holds that its denial was "'arbitrary, capricious, … or otherwise not in accordance with law.'"

In *U. S. v. Atlantic Research Corp.*,[37] a unanimous Court held that section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides the respondent with a cause of action against the petitioner for reimbursement of environmental cleanup costs. CERCLA contains two provisions that "allow private parties to recover expenses associated with cleaning up contaminated sites." Section 107(a) makes four categories of potentially responsible parties (PRPs) liable for "(A) all costs of removal or remedial action incurred by the

35. 127 S. Ct. 1746 (2007).
36. 127 S. Ct. 1438 (2007).
37. 127 S. Ct. 2331 (2007).

United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." Section 113(f) additionally "authorizes one PRP to sue another for contribution in certain circumstances." In *Cooper Industries, Inc. v. Aviall Services, Inc.*,[38] the Court held that "a private party could seek contribution from other liable parties only after having been sued under §106 or §107(a)." *Cooper*, however, left open the issue of "whether PRPs have rights under §107(a)(4)(B)." In the instant case, the respondent Atlantic Research was hired by the petitioner United States to retrofit rocket motors. During this process, the respondent contaminated nearby "soil and groundwater," cleaned the site, and later sought contribution from the petitioner under sections 107(a) and 113(f). After the Court's decision in *Cooper*, however, the respondent "amended its complaint to seek relief under §107(a) and federal common law." The Court begins by noting that "[t]he parties' dispute centers on what 'other person[s]' may sue under §107(a)(4)(B)." The Court agrees with Atlantic Research that "subparagraph (B) can be understood only with reference to subparagraph (A)" and "any other person" includes "anyone except the United States, a State, or an Indian tribe—the persons listed in subparagraph (A)." The government argues that the Court's "interpretation will create friction between §107(a) and §113(f)." The Court rejects this reasoning, noting that it has "previously recognized that §§107(a) and 113(f) provide two 'clearly distinct' remedies" in that section 113(f) allows a right to contribution "contingent upon an inequitable distribution of common liability among liable parties" while section 107(a) "permits recovery of cleanup costs but does not create a right to contribution." The Court concludes that the government's fears of "friction" are unfounded and that section 107(a)(4)(B) "provides Atlantic Research with a cause of action."

In *National Ass'n of Home Builders v. Defenders of Wildlife*,[39] a 5-4 Court held that a mandatory provision of the Clean Water Act of 1972 (CWA) controls a mandatory provision of the Endangered Species Act of 1973 (ESA). The CWA provides that the EPA shall administer the review and approval of permits under the National Pollution Discharge Elimination System (NPDES) in each state. A state can apply to take control of its permitting system, and if it makes a showing of nine criteria, the EPA "'shall approve'" its application. The ESA is designed to protect endangered species and gives the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) authority to administer the ESA with respect to species under the jurisdiction of the Secretary of the Interior and the Secretary of Commerce, respectively. Under section 7 of the ESA, federal agencies must "'insure that any action authorized … by such agency … is not likely to jeopardize the continued existence of any endangered species ….'" In 2002, Arizona applied to administer its NPDES permitting system, and the EPA began to consult with FWS regarding the application. FWS found no directly negative impact on an endangered species but was concerned about possible future impacts. The EPA found these possibilities to be too attenuated and also believed that they were legally required to approve the transfer because Arizona had met the nine CWA requirements. After further consultation, the EPA approved the transfer to Arizona. The respondents filed a petition "seeking review of the transfer," and the petitioners, the National Association of Home Builders, were granted permission to intervene. The respondent Defenders of Wildlife filed a different action, alleging that the FWS failed to comply with the ESA in issuing its biological opinion. The Ninth Circuit consolidated the two actions, held that the EPA's decision granting the transfer was "arbitrary and capricious" and vacated the transfer. The Court first notes the strong deference it gives agency decisions. The Court disagrees with the Ninth Circuit's determination that the EPA's position was "'internally inconsistent'" because the only inconsistency the respondent's can point to is that EPA "changed [its] mind" over the course of consulting with FWS, and the EPA was "fully entitled to do" so. The Court next examines the statutory conflict between the CWA and the ESA. The Court believes that a literal application of the ESA would "'*ad*[*d*] one [additional] requirement'" to the nine already mandated by the CWA, reversing its mandatory nature. The Court states that later enacted statutes, like the ESA, are normally not construed to repeal an earlier provision unless such a construction "'is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all.'"" Applying this principle, the Court rejects the Ninth Circuit's broad interpretation of the ESA that would alter the CWA's mandate. To resolve the statutory conflict, the Court looks to the interpretation of the implementing agencies (FSW and NMFS), whose reading would limit application of section 7 of the ESA to agency "'actions in which there is *discretionary* Federal involvement or control.'" The Court finds that deference to the agencies' interpretation is warranted because it is a reasonable reading of the statute. Therefore, the Court concludes that because EPA's decision under the CWA is not discretionary, section 7 of the ESA does not control.

[A] 5-4 Court held that a mandatory provision of the Clean Water Act of 1972 controls [over] a mandatory provision of the Endangered Species Act of 1973.

IMMIGRATION

In *Lopez v. Gonzales*,[40] an 8-1 Court held that an offense qualifying as a felony under state law but only as a misdemeanor under the Controlled Substances Act (CSA) is not a felony punishable under the CSA. The petitioner Jose Antonio Lopez entered the United States illegally in 1986 but became a

38. 543 U.S. 157 (2004).
39. 127 S. Ct. 2518 (2007).
40. 127 S. Ct. 625 (2006).

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Court Review Author Submission Guidelines

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legal permanent resident in 1990. In 1997, he pleaded guilty to aiding and abetting another's possession of cocaine, a state felony in South Dakota. After serving 15 months of his five-year sentence, the petitioner was released and the Immigration and Naturalization Service (INS) began removal proceedings against him because his conviction was a controlled substance violation and an aggravated felony. The petitioner contested the aggravated-felony classification because his conduct is only a misdemeanor under the CSA. The immigration judge disagreed because drug possession was a felony under state law. The Board of Immigration Appeals (BIA) affirmed, and the Court of Appeals affirmed. This outcome required the mandatory removal of the petitioner, whereas a finding in the petitioner's favor would leave his removal open for discretionary cancellation. The Supreme Court granted certiorari to address conflicting decisions in the circuits regarding the correct interpretation of the CSA in this regard. The Court begins by addressing the statutory language involved. Immigration and Nationality Act (INA) section 1101(a)(43)(B) defines an aggravated felony to include "illicit trafficking in a controlled substance … including a drug trafficking crime …." Title 18 defines drug-trafficking crime as "any felony punishable under the Controlled Substances Act." The government argues that the petitioner's conduct satisfies this language because it is a felony, under South Dakota state law, and it is punishable under the CSA, albeit as a misdemeanor. The Court rejects this argument because the plain meaning of "trafficking" would not include the petitioner's crime of possession. The government's interpretation is also rejected because it would "render the law of alien removal … dependent on varying state criminal classifications" where Congress's intent seems to be quite the opposite. The Court states that Congress instead likely intended the law to depend upon the felony and misdemeanor scheme it establishes in the CSA. In conclusion, the Court holds "that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."

In *Gonzales v. Duenes-Alvarez*,[41] an 8-1 Court held that aiding and abetting theft falls within the definition of a generic theft for the purposes of removal under the Immigration and Nationality Act (INA). The respondent Luis Duenas-Alvarez is a permanent resident of the United States. He was convicted as an accessory for violating Cal. Veh. Code Ann. section 10851(a), which states in the pertinent part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof … or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense." The government began removal proceedings against the respondent under the INA, which allows for removal of certain aliens who are convicted of some offenses, including theft. A Federal immigration judge found that the respondent was removable because of his conviction. The Bureau of Immigration Appeals (BIA) affirmed, and the respondent petitioned for review in the Ninth Circuit. The Ninth Circuit remanded the respondent's case to the BIA because of its decision in *Penuliar v. Ashcroft*,[42] which held that Cal. Veh. Code Ann. section 10851(a) "sweeps more broadly than generic theft." The Court begins its analysis by noting the four traditional common-law aiding-and-abetting categories: (1) first-degree principals; (2) second-degree principals; (3) accessories before the fact; and (4) accessories after the fact. The Court states that the first three categories have largely merged, and the vast majority of jurisdictions now distinguish only between principal accessories and accessories after the fact. The Court holds that a generic theft offense covers principal accessories as well as principals. The Court next addresses the respondent's attempt to demonstrate that the California statute criminalizes conduct that most jurisdictions do not consider "theft." The respondent argues that the statute unconstitutionally makes the accused liable for unintended and unforeseen consequences. The Court disagrees and states that such a showing requires "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." The Court concludes that the respondent has not met this burden because he has pointed to no cases involving such a misapplication of the California statute.

[A]n 8-1 Court held that an indictment that fails to allege any overt act in an attempt offense is constitutionally sufficient . . . .

In *U.S. v. Resendiz-Ponce*,[43] an 8-1 Court held that an indictment that fails to allege any overt act in an attempt offense is constitutionally sufficient because it uses the word "attempt" and describes the time and place of the alleged attempt. The respondent Juan Resendiz-Ponce was deported in 1988 and again in 2002. He attempted to reenter the country in 2003 by presenting the photo identification of his cousin and claiming to be a legal resident of the United States. The respondent was charged with violating 8 U.S.C. section 1326(a) for attempting to reenter the country illegally. The indictment stated that the respondent "knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States." The respondent attempted to have the indictment dismissed on the grounds that it "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such over act." After the District Court denied the respondent's motion, he was found guilty and sentenced to 63 months of imprisonment. The Ninth Circuit reversed his conviction, finding that the "omission of 'an essential element of the offense is a fatal flaw and not subject to mere harmless error analysis.'" The Court begins by addressing the government's argument that the indictment implicitly alleges that the respondent committed

41. 127 S. Ct. 815 (2007).
42. 395 F.3d 1037 (2005).
43. 127 S. Ct. 782 (2007).

[A] unanimous Court held that overtime and minimum wage standards . . . do not apply to . . . a domestic caregiver employed by a third-party agency . . . .

the requisite overt act "simply by alleging that 'he attempted to enter the United States.'" The Court states that *Hamling v. U.S.*[44] requires two elements for an indictment to be constitutional: "First, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." The Court holds that the indictment at issue satisfies both of these requirements by using the word "attempt" and specifying the time and place of the alleged attempt. The Court also notes that the indictment complies with the Rule 7(c)(1) requirement that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

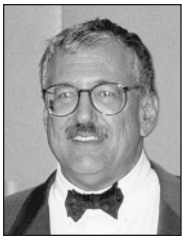
LABOR LAW

In *Beck v. PACE Intern. Union*,[45] a unanimous Court held that the petitioner did not breach a fiduciary duty in failing to fully consider the respondent's merger proposal. The petitioner Crown Paper provided a defined-benefit pension plan for the 2,600 persons employed at its paper mills. Under a defined-benefit pension plan, employers take the risk of covering the pension payments if investments do not pay off but also benefit if investments provide more than is necessary to cover the payments. In 2000, the petitioner filed for bankruptcy and considered termination of its pension plan under the Employee Retirement Income Security Act of 1974 (ERISA) through the purchase of annuities. The respondent PACE International Union represented the petitioner's employees covered under the defined-benefit plans. Instead of terminating the pension plan, the respondent proposed a merger with the PACE Industrial Union Management Pension Fund (PIUMPF) that would shift all plan assets and liability to PIUMPF. While examining its pension plan, however, Crown "discovered that it had overfunded certain of its pension plans, so that purchasing annuities would allow it to retain a projected $5 million reversion." This reversion would go to PIUMPF under PACE's proposed merger. Crown rejected the respondent's merger proposal and decided to terminate its plan through the purchase of annuities, allowing Crown "to reap the $5 million reversion in surplus funds." In response, PACE filed suit against Crown in Bankruptcy Court, "alleging that Crown's directors had breached their fiduciary duties under ERISA by neglecting to give diligent consideration to PACE's merger proposal." The Bankruptcy Court agreed and issued a preliminary injunction against Crown, "preventing [it] from obtaining the $5 million reversion." The petitioner appealed to the District Court, which affirmed, as did the Ninth Circuit. The Court begins its discussion by noting that under ERISA, an employer only has a fiduciary duty when acting as plan administrator as the decision "*whether* to terminate an ERISA plan is … immune from ERISA's fiduciary obligations." PACE acknowledges this but "says that its proposed merger was different, because [it] represented a *method of terminating* the Crown plans." Because ERISA imposes a fiduciary duty in selecting annuities when terminating a plan, PACE argues this duty should similarly apply to the merger method of termination. In examining this argument, the Court finds that it must first determine whether the proposed merger is "a *permissible* form of plan termination under ERISA." The Court states that section 1341(b)(3)(A) of ERISA contains an exhaustive list of procedures for terminating pension plans and agrees with petitioner that the merger plan is not included. The Court further notes that merger is not explicitly mentioned in the section but is "expressly provided for in an entirely separate set of statutory sections." In light of this interpretation, the Court concludes that the merger is not permissible, and Crown did not breach a fiduciary duty in not considering PACE's merger proposal.

In *Long Island Care at Home, Ltd. v. Coke*,[46] a unanimous Court held that overtime and minimum-wage standards in the Fair Labor Standards Act of 1938 (FLSA) do not apply to the respondent because she is a domestic caregiver employed by a third-party agency, and Department of Labor (DOL) regulations exempt her from these requirements. The FLSA was amended by Congress in 1974 "to include many 'domestic service' employees …." However, Congress exempted "any employee employed in domestic service employment to provide companionship services for individuals who … are unable to care for themselves." Shortly thereafter, the DOL issued a regulation limiting the term "domestic service employment" to employees who work "'in or about a private home … *of the person by whom he or she is employed*." Another DOL regulation, the "third-party regulation," defines exempt companionship workers as those "'who are employed by an employer or agency other than the family or household using their services…." The respondent Evelyn Coke is a domestic worker "who provides 'companionship services' to elderly and infirm men and women." She brought suit against her former employer, the petitioner Long Island Care at Home, alleging a failure to compensate her for overtime and minimum wages that she was entitled to under the FLSA. The District Court dismissed her claim, citing the DOL third-party regulation. The Second Circuit reversed because it found the third-party regulation "'unenforceable.'" The Court begins by noting that administrative agencies have the power to "'formulat[e] … policy … to fill any gap left, implicitly or explicitly, by Congress." The Court will generally defer to those regulations if they are reasonable "and in accordance with other applicable

44. 418 U.S. 87 (1974).
45. 127 S. Ct. 2310 (2007).
46. 127 S. Ct. 2339 (2007).

(e.g., procedural) requirements." The Court finds that the FLSA contains explicit gaps regarding the definitions of "domestic service employment" and "companionship service," and that the DOL has "the power to fill these gaps." The respondent argues that the third-party regulation is unreasonable because: (1) it "falls outside the scope of Congress' delegation;" (2) it contradicts another binding regulation; (3) it does not "[warrant] judicial deference;" and (4) it "was improperly promulgated." The Court rejects the first argument because the FLSA "language refers broadly to 'domestic service employment' and 'companionship services.'" The Court states that this leaves it to the DOL to "work out the details of those broad definitions." The respondent's second argument is that the third-party regulation conflicts with the DOL regulation defining "domestic service employment." The Court acknowledges a conflict but concludes that the third-party regulation controls because it believes congressional intent is more in line with this conclusion. Also, the Court states that "normally the specific governs the general" and finds that the third-party regulation is more specific in its purpose. The Court rejects the respondent's third argument because it finds that the DOL clearly intended the regulation to be legally binding in that it "used full public notice-and-comment procedures" when passing the regulation and has since "treated [it] … as a legally binding exercise of its rulemaking authority." In this situation, the Court concludes that "a court ordinarily assumes that Congress intended it to defer to the agency's determination." Finally, the respondent argues that the "notice-and-comment procedure, leading to the promulgation of the third-party regulation, was legally 'defective' because notice was inadequate and the [DOL's] explanation also inadequate." The Court disagrees, finding that the final third-party regulation was a foreseeable outgrowth of the proposal during the notice-and-comment procedure and that there is no "significant legal problem with the [DOL's] explanation for the change." For the foregoing reasons, the Court concludes that the third-party regulation controls.



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Recent Criminal Decisions of the United States Supreme Court:

The 2006-2007 Term

Charles H. Whitebread

The past Term of the Court was one in which it swung to the right. A single justice, Justice Anthony Kennedy, made all the difference—being in the majority in every five-to-four decision that split along ideological lines. Cases of particular interest to state-court judges held that a passenger in a routine traffic stop is seized for Fourth Amendment purposes, that California's determinative sentencing law was unconstitutional, and that the Court's decision on *Crawford v. Washington* would not be applied retroactively on collateral review.

FOURTH AMENDMENT

Justice Scalia delivered the opinion of the Court in *Scott v. Harris*,[1] which held that a police officer did not violate a passenger's Fourth Amendment rights by bumping his car off the road during a high-speed chase. The petitioner, a Georgia police officer, joined a high-speed pursuit in progress and received permission to "take … out" the pursued vehicle. The petitioner "applied his push bumper to the rear of respondent's vehicle," and the respondent was paralyzed in the resulting crash. The respondent alleged "a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment." After examining a "videotape capturing the events in question," the Court finds that the respondent "plac[ed] police officers and innocent bystanders alike at great risk of serious injury." To determine the reasonableness of petitioner's action, the Court balances "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" After weighing the risks caused by the petitioner's actions and the danger that the police officer was trying to eliminate, the Court concludes that his decision to bump the respondent's car was reasonable and that he is entitled to summary judgment.

In *Los Angeles County, California v. Rettele*,[2] the Court held that a search of the respondents' house was reasonable despite the fact that the respondents were of a different race than the original suspects. Los Angeles County deputies "obtained a valid warrant to search a house, … unaware that the suspects being sought had moved out three months earlier." Upon entering the house at 7:00 a.m., deputies found the respondents Max Rettele and Judy Sadler naked in bed and held them at gunpoint for one to two minutes before allowing them to dress and instructing them to wait in the living room. Within five minutes, the deputies realized their mistake, apologized, and left the house. The respondents claimed that their Fourth Amendment rights had been violated, but the District Court held "that the warrant was obtained by proper procedures and the search was reasonable." The Ninth Circuit reversed. The Court rejects the Ninth Circuit's holding because "it is not uncommon for people of different races to live together," so "[w]hen the deputies ordered respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." The Court also notes that "officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search." Because an armed suspect might easily hide a firearm in bedding, the Court finds the officers' orders to be reasonable under the circumstances and concludes that the respondents' constitutional rights were not violated.

In *Brendlin v. California*,[3] a unanimous Court held that a routine traffic stop subjects a passenger to a Fourth Amendment seizure in an opinion delivered by Justice Souter. The petitioner Bruce Brendlin was riding as a passenger in a car when it was stopped by Deputy Sheriff Robert Brokenbough. Deputy Brokenbough recognized the petitioner and arrested him after verifying that he "was a parole violator with an outstanding no-bail warrant for his arrest." A search revealed several items in the car that are used to manufacture methamphetamines. The petitioner moved at trial to suppress the evidence against him as "fruits of an unconstitutional seizure," arguing that the traffic stop unlawfully seized his person. The Supreme Court of California denied the motion and held that "a passenger 'is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the … officer's investigation or show of authority.'" The Court begins by stating that a Fourth Amendment seizure occurs when an officer, "'by means of physical force or show of authority,' terminates or restrains [a person's] freedom of movement." The Court next cites the test established in *Unites States v. Mendenhall*,[4] which states that a seizure occurs if "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" The Court also notes that prior cases have repeatedly stated in dicta "that during a traffic stop an officer seizes everyone in the vehicle, not just the driver" and that the Court has never made

Footnotes

1. 127 S. Ct. 1769 (2007).
2. 127 S. Ct. 1989 (2007).
3. 127 S. Ct. 2400 (2007).
4. 446 U.S. 544 (1980).

"any distinction between driver and passenger that would affect the Fourth Amendment." The Court next asks "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." In response, the Court reasons that a passenger "will expect to be subject to some scrutiny" and will not feel that he or she can simply leave during the traffic stop. Therefore, the Court concludes that a passenger is seized during a routine traffic stop.

SIXTH AMENDMENT

In the decision on *Carey v. Musladin* by Justice Thomas,[5] the Court held that a state court reasonably applied federal precedent in allowing family members of a murder victim to wear buttons with the victim's picture on them during the murder trial. The respondent Mathew Musladin was convicted by a jury of first-degree murder. Members of the victim's family attended some of the trial while wearing buttons with a photo of the victim on them, and the trial court denied a motion by the respondent's counsel to order the family members not to wear the buttons. The respondent appealed his conviction and argued that the court's decision to allow the buttons deprived him of his right to a fair trial under the Sixth Amendment. The Court of Appeal concluded that under the standard established in *Holbrook v. Flynn*,[6] the buttons had not "branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." The respondent filed a federal writ of habeas corpus, and the District Court granted a certificate of appealability on the buttons question. The Ninth Circuit found that the state court's decision failed to correctly apply *Flynn* and *Estelle v. Williams*[7] and reversed. The Court begins by noting that under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas relief can be granted "if the California Court of Appeal's decision was contrary to or involved an unreasonable application of" the Court's previous holdings. *Williams* involved a defendant who was forced to wear identifiable prison clothing during his trial. The Court concluded that this action violated his Fourteenth Amendment rights. *Flynn* addressed the issue of seating "'four uniformed state troopers'" immediately behind the defendant at trial. The Court held that this presence did not violate the defendant's right to a fair trial. The Court distinguishes *Williams* and *Flynn* from the present case because they involved government-sponsored actions in contrast to the private spectators' actions of wearing the buttons. The Court holds that due to a lack of Supreme Court decisions regarding private spectator's conduct, the Ninth Circuit erred in holding that the California Court of Appeal's ruling was an unreasonable application of "clearly established Federal law."

In an opinion delivered by Justice Ginsburg, a 6-3 Court in *Cunningham v. California*[8] held that California's determinative sentencing law (DSL) violated petitioner John Cunningham's Sixth and Fourteenth Amendment rights. The petitioner was convicted of continuous sexual abuse of a child under the age of 14. Under the DSL, this crime requires "a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years." The DSL mandates that a trial judge sentence the defendant to the middle term unless he finds additional aggravating or mitigating factors by a preponderance of the evidence at a sentencing hearing. In the petitioner's case, the judge found six aggravating factors and one mitigating factor and sentenced petitioner to the upper term sentence of 16 years. The Court begins its review by examining the history of the DSL, which was enacted to "promote uniform and proportionate punishment." The Court finds that the DSL frequently uses the term "fact" and requires a preponderance of the evidence, "a clear factfinding directive." The Court states that it has consistently held that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." In *Apprendi v. New Jersey*,[9] the Court held that an extended prison term was not valid when imposed because of a judge's finding that the crime was committed "'with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.'" The Court finds that although it should be clear that California's DSL violates *Apprendi*'s rule, it must address the California Supreme Court's decision in *People v. Black*[10] to the contrary. The *Black* decision held that the DSL only allows "'the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence.'" The Court rejects this decision because the *Apprendi* rule leaves "no room for such an examination" by a judge. The Court concludes that the DSL violates the Sixth Amendment and notes that it is up to California to adjust its sentencing system in light of this decision.

[A] 6-3 Court . . . held that California's determinative sentencing law violated . . . Sixth and Fourteenth Amendment rights.

In Justice Breyer's decision on *Rita v. U.S.*,[11] an 8-1 Court held that the Circuit Courts of Appeals may presume a sentence imposed within a properly determined U.S. Sentencing Guidelines range is reasonable. The petitioner Victor Rita was convicted of perjury, making false statements, and obstructing justice. During sentencing, the Guidelines were applied and a sentencing range of 33-to-41 months was recommended. The petitioner raised two arguments for a sentence outside of the recommended range: (1) that within the Guideline's framework his case was "atypical" and "falls outside the 'heartland' to which the United States Sentencing Commission intends each individual Guideline to apply;" and (2) that "independent

5. 127 S. Ct. 649 (2006).
6. 475 U.S. 560 (1986).
7. 425 U.S. 501 (1976).
8. 127 S. Ct. 856 (2007).
9. 530 U.S. 466 (2000).
10. 35 Cal. 4th 1238 (2005).
11. 127 S. Ct. 2456 (2007).

[A] 5-4 Court . . . upheld California's catchall factor (k) instruction against an Eighth Amendment challenge.

of the Guidelines, application of the sentencing factors set forth in 18 U.S.C. §3553(a) … warrants a lower sentence." The sentencing judge entered a sentence of 33 months, the Guidelines minimum. The Fourth Circuit affirmed and stated that "'a sentence imposed within the properly calculated Guidelines range … is presumptively reasonable.'" The Court begins by noting that a presumption of reasonableness "is not binding" and merely reflects the "double determination" made by the sentencing judge and the Sentencing Commission that the sentence is reasonable. In reviewing the legislative history of the Guidelines, the Court finds that "[t]he Commission has made a serious, sometimes controversial, effort to carry out [Congress's] mandate," reflecting the dual goals of uniformity and proportionality, despite the fact that they sometimes conflict. The Court concludes that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." The Court also relies upon *U.S. v. Booker*,[12] which held that a provision of the Guidelines that made them binding on district courts was unconstitutional. The Court finds that the *Booker* opinion "made clear that today's holding does not violate the Sixth Amendment" in stating that "'the constitutional issues presented … would have been avoided entirely if Congress had omitted … the provisions that make the Guidelines binding on district judges.'" The Court concludes that the petitioner's circumstances do not "require a sentence lower than the sentence the Guidelines provide."

In *Whorton v. Bockting*,[13] a unanimous Court held that its decision in *Crawford v. Washington*[14] does not apply retroactively to the respondent's case. The respondent Marvin Bockting resided with his wife, Laura, and Laura's daughter from a previous relationship, Autumn. One night Autumn told her mother that the respondent had sexually abused her. Laura took Autumn to a hospital where an examination of her "revealed strong physical evidence of sexual assaults." Detective Charles Zinovitch interviewed Autumn while her mother was present, and she described in detail what the respondent had allegedly done to her. The respondent was arrested and indicted on four counts of sexually assaulting a minor under 14 years of age. At trial, Autumn was too unnerved to testify, and the state moved to allow Laura and "Detective Zinovitch to recount Autumn's statements regarding the sexual assaults." The trial court admitted the testimony over the defense counsel's objection, and the respondent was subsequently convicted of three counts of sexual assault. The Nevada Supreme Court affirmed the decision of the trial court, relying on *Ohio v. Roberts*.[15] While the respondent's appeal to the Ninth Circuit was pending, the Court decided *Crawford*, which overruled *Roberts*, and held that "'[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].'" The respondent contended on appeal that under *Crawford*, Autumn's out-of-court testimony would not have been admitted. The Court begins by examining *Teague v. Lane*,[16] which states that "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." The Court decides that *Crawford* announces a new rule because its decision was not dictated by precedent and was, in fact, contrary to *Roberts*. Because *Crawford* is a new rule, it cannot apply retroactively unless "it is a '"watershed rul[e] of criminal procedure"' implicating the fundamental fairness and accuracy of the criminal proceeding." This requires showing: (1) that the rule is needed to prevent "'an "'impermissibly large risk'"' of an inaccurate conviction" and (2) that the rule "'alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" The Court holds that the first requirement is not satisfied because *Crawford*'s impact is uncertain and not significant. The Court also finds that *Crawford* does not meet the second requirement because it does not effect "a profound and 'sweeping'" change. Therefore, *Crawford* does not apply retroactively, and the judgment of the Ninth Circuit is reversed.

CAPITAL SENTENCING

A 5-4 Court in *Ayers v. Belmontes*,[17] upheld California's catchall factor (k) instruction against an Eighth Amendment challenge. The respondent Fernando Belmontes was convicted of first-degree murder. During sentencing he introduced mitigating evidence to demonstrate his ability to positively contribute to society as a prison inmate. The trial judge's sentencing instructions to the jury included California's catchall factor (k) instruction that allows the jury to consider "'[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" Based on these instructions, the respondent was sentenced to death. The Court begins its review by considering the previous challenges to factor (k) in *Boyde v. California*[18] and *Brown v. Payton*.[19] *Boyde* involved a challenge to factor (k)'s ability to allow jury consideration of mitigating evidence related to a defendant's background or character. In *Payton*, the defendant made a similar argument with respect to postcrime mitigating evidence. The Court rejected both challenges. The Court distinguishes the present case from *Payton* in that the federal habeas petition at issue was filed before the AEDPA deadline, resulting in a less deferential standard of review. Therefore, the relevant

12. 543 U.S. 220 (2005).
13. 127 S. Ct. 1173 (2007).
14. 541 U.S. 36 (2004).
15. 448 U.S. 56 (1980).
16. 489 U.S. 288 (1989).
17. 127 S. Ct. 469 (2006).
18. 494 U.S. 370 (1990).
19. 544 U.S. 133 (2005).

inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The Court analogizes the respondent's mitigating evidence to the precrime evidence in *Boyde*, concluding that it is well within the range of consideration that factor (k) allows. Furthermore, both the respondent and the prosecution discussed the evidence extensively, and it is "improbable the jurors believed that the parties were engaging in an exercise in futility." The Court concludes that it is highly unlikely that the jury felt that it could not consider the mitigating evidence presented by the respondent regarding his future value as an inmate.

In *Abdul-Kabir v. Quarterman*[20] and its companion case *Brewer v. Quarterman*,[21] a 5-4 Court held that Texas's sentencing instructions in capital cases did not give the jury enough opportunity to weigh the mitigating evidence presented in each case. The petitioner Jalil Abdul-Kabir was convicted of capital murder. At his sentencing hearing, he presented "testimony from his mother and his aunt, who described his unhappy childhood" and testimony from a psychologist that "sought to provide an explanation for [petitioner's] behavior that might reduce his moral culpability." The trial court denied the petitioner's request for special instructions and instead asked the jury: (1) "Was the conduct of the defendant … committed deliberately and with the reasonable expectation that the death of the deceased … would result?"; and (2) "Is there a probability that the defendant … would commit criminal acts of violence that would constitute a continuing threat to society?" Under the Texas criminal code, if the jury answers both questions affirmatively, the judge must impose a death sentence. The jury answered in the affirmative, and Abdul-Kabir was sentenced to death. In the companion case, the petitioner Brent Ray Brewer was convicted of murder. He presented mitigating evidence including a recent "bout with depression," manipulation and domination by his female co-defendant, and abuse of drugs. As in Abdul-Kabir's case, a sentencing jury answered the sentencing questions affirmatively, and Brewer was sentenced to death. The Court begins the *Abdul-Kabir* opinion by noting that because the AEDPA applies, it must determine "whether the Texas Court of Criminal Appeals' (CCA) adjudication of [Abdul-Kabir's] claim on the merits 'resulted in a decision that was contrary to … clearly established Federal law.'" The Court finds that its precedent clearly establishes that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty…." Turning to the trial court's decision, the Court states that the "trial judge did not analyze [*Penry v. Lynaugh* (*Penry I*)[22]]," but instead "relied on three later Texas cases and on [the Court's] opinion in *Graham v. Collins*."[23] The Court finds that *Graham* is less relevant to Abdul-Kabir's case than *Penry I*, and the trial court's use of this formulation of the issue "resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of'" the Court's previous decisions. The Court next finds that the CCA erred in its application of *Penry I* because it "ignored the fact that even though [Abdul-Kabir's] mitigating evidence may not have been as persuasive as Penry's, it was relevant … for precisely the same reason." The Court concludes that it is conceivable that a juror could find "himself without a means for giving *meaningful* effect to the mitigating qualities" of the presented evidence as mandated by *Penry I*. Accordingly, the judgment of the Fifth Circuit denying Abdul-Kabir's application for a writ of habeas corpus is reversed, and the case remanded. In the *Brewer* opinion, the Court states that the Fifth Circuit erred in its decision, and the decision is reversed for the reasons enumerated in the *Abdul-Kabir* opinion.

[A] 5-4 Court held that Texas's sentencing instructions in capital cases did not give the jury enough opportunity to weigh the mitigating evidence . . . .

In *Smith v. Texas*,[24] a 5-4 Court held that the Texas Court of Criminal Appeals, (CCA) requirement that the petitioner show egregious harm was an error based "on a misunderstanding of the federal right" that the petitioner asserted. The petitioner LaRoyce Lathair Smith was convicted of first-degree murder. The sentencing phase of his trial took place between *Penry v. Lynaugh* (*Penry I*),[25] and *Penry v. Johnson* (*Penry II*).[26] During this interim period, the Texas trial court in Smith's case attempted to correct the special jury instructions invalidated in *Penry I* by instructing the jury to "nullify the special issues if the mitigating evidence, taken as a whole, convinced the jury Smith did not deserve the death penalty." Nevertheless, the jury answered affirmatively to the special instructions, and the petitioner was sentenced to death. Following this sentencing phase, the Court held in *Penry II* that a similar nullification charge was "insufficient to cure the flawed special issues." The petitioner sought relief, but the CCA affirmed the denial of relief. The Court granted certiorari and reversed in *Smith v. Texas* (*Smith I*).[27] On remand, the CCA again denied relief, holding that petitioner's "pretrial objections did not preserve the claim of constitutional error he asserts" and that under Texas law, "this procedural default required Smith to show egregious harm—a burden … he did not meet." The Court begins by discussing the CCA's decision. The Court disagrees with the CCA's egregious-harm requirement because the basis for reversal in *Smith I* was that the nullification charge did not "[cure] the underlying *Penry* error" and not some separate error based on the nullification charge itself. The Court finds

20. 127 S. Ct. 1654 (2007).
21. 127 S. Ct. 1706 (2007).
22. 492 U.S. 302 (1989).
23. 506 U.S. 461 (1993).
24. 127 S. Ct. 1686 (2007).
25. 492 U.S. 302 (1989).
26. 532 U.S. 782 (2001).
27. 543 U.S. 37 (2004).

In *Panetti v. Quarterman*, a 5-4 Court overturned the death sentence of a mentally ill prisoner.

that the petitioner's "central objection at each stage has been to the special issues" and that this is sufficient to preserve his claim of *Penry* error as vindicated in *Smith I*. Therefore, under the Texas framework, he is only required to show "'*some* harm'" from the CCA's error. The Court concludes that this harm exists because the petitioner "has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence."

In *Panetti v. Quarterman*,[28] a 5-4 Court overturned the death sentence of a mentally ill prisoner. The petitioner Scott Louis Panetti killed his wife's parents in front of his wife and daughter. A court-ordered psychiatric evaluation "indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations." At trial, the petitioner represented himself, "claimed he was not guilty by reason of insanity," and displayed very strange behavior. Afterwards, a jury found him guilty of murder and sentenced him to death. After his execution date was set, the petitioner's counsel filed a motion claiming "for the first time, that due to mental illness he was incompetent to be executed." In state court, two court-appointed mental-health experts evaluated the petitioner and concluded that he "'knows that he is to be executed, and that his execution will result in his death,' and, moreover, that he 'has the ability to understand the reason he is to be executed.'" Despite his objections to the evaluation and proceedings, the court held that the petitioner had not shown he was incompetent to be executed. The petitioner "returned to federal court," and the District Court denied his habeas petition on the grounds that he "had not shown incompetency as defined by Circuit precedent." In the Supreme Court, the petitioner argues that under the AEDPA, no deference is due to the state court's judgment. The Court agrees with the petitioner because the state court's "failure to provide the procedures mandated by *Ford v. Wainwright*,[29] constituted an unreasonable application of clearly established law." The Court states that the trial court did not give the petitioner "an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court" and that this is an unconstitutional error. After finding that "[t]here is … much in the record to support the conclusion that petitioner suffers from severe delusions," the Court turns to an examination of the District Court's holding that the petitioner is competent enough to be executed because he knows that he committed the murders, that he will be executed, and that the justification for his execution is his commission of the murders. The Court concludes that the District Court was mistaken because "[i]t is error to derive from *Ford* … a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted."

CRIMINAL STATUTORY INTERPRETATION

A unanimous Court in *Jones v. Bock*[30] rejected the Sixth Circuit's interpretation of the Prisoner Litigation Reform Act of 1995 (PLRA). The petitioners are three inmates who filed grievances against prison officials and officers of the Michigan Department of Corrections. The PLRA mandates that prisoners "exhaust prison grievance procedures before filling suit." In interpreting the PLRA, the Sixth Circuit required that proof of exhaustion be attached to prisoner complaints and also that the defendants "have been named from the beginning of the grievance process." If both exhausted and unexhausted claims were pleaded in a single complaint, the Sixth Circuit applied a "total exhaustion" rule and dismissed the entire suit. The Court begins by addressing whether the PLRA requires exhaustion to be pleaded in the complaint or whether it is an affirmative defense for the defendant. The Court finds that under the Federal Rules of Civil Procedure, exhaustion is usually treated as an affirmative defense and that there is nothing explicit or implicit in the PLRA to the contrary. The respondent, however, contends that the PLRA was meant to deviate from this traditional framework to effectively reduce the volume of frivolous prisoner lawsuits. The Court feels that this argument proves too much and that "the same could be said with respect to any affirmative defense." The Court holds that under the PLRA, exhaustion need not be pleaded by an inmate in his or her complaint, and failure to exhaust is an affirmative defense. The Court next turns to the issue of whether inmates must name all future defendants in their initial grievances. Finding that "nothing in the statute imposes a 'name all defendants' requirement," the Court holds that "exhaustion is not *per se* inadequate simply because an individual later sued is not named in the grievances." Finally, the Court addresses the Sixth Circuit's totalexhaustion rule. The respondents argue that the PLRA language stating that "'no action shall be brought' unless administrative procedures are exhausted" bars an entire suit because Congress would have used the term "claim" instead of "action" if it intended otherwise. The Court rejects this argument as reading too much into boilerplate language and concludes that the Sixth Circuit's interpretation of the PLRA is erroneous.

In *James v. U. S.*,[31] a 5-4 Court held that attempted burglary is a felony for purposes of the Armed Career Criminal Act's (ACCA) mandatory minimum sentencing requirement. The ACCA provides that any "'person who violates section 922(g) … and has three prior convictions … for a violent felony or a serious drug offense'" is subject to a mandatory minimum sentence of 15 years. Section 922(g) is violated when a felon is convicted of possession of a firearm. A violent felony is defined under the ACCA as "any crime punishable by imprisonment for a term exceeding one year … that … (ii) is burglary, arson, or extortion, … or otherwise involves conduct

28. 127 S. Ct. 2842 (2007).
29. 477 U.S. 399 (1986).
30. 127 S. Ct. 910 (2007).
31. 127 S. Ct. 1586 (2007).

that presents a serious potential risk of physical injury to another." The petitioner Alphonso James, a previously convicted felon, pleaded guilty to violating section 922(g) and had been convicted of three previous felonies: two serious drug convictions and one attempted burglary conviction. At the petitioner's trial, the District Court concluded "that attempted burglary is a violent felony" and applied the ACCA's minimum mandatory sentence. The Court begins by noting that the only possible way the petitioner's attempted burglary conviction qualifies as a violent felony is if it "'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" The Court turns to the question of "whether attempted burglary, as defined by Florida law, is an offense that 'involves conduct that presents a serious potential risk of physical injury to another.'" The Court finds that the risk of burglary "arises not from completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress" and that attempted burglary "poses the same kind of risk." The Court also notes that every Court of Appeals that has dealt with an attempted-burglary statute similar to Florida's "has held that the offense qualifies as a 'violent felony.'" The Court concludes that attempted burglary under the Florida law is a violent felony under ACCA's residual provision.

In *Wilkie v. Robbins*,[32] the Court declined to create a new constitutional cause of action to govern the respondent's case and also denied his Racketeer Influenced and Corrupt Organizations Act's (RICO) claim. The respondent Frank Robbins purchased the title to a ranch in Wyoming from George Nelson. Nelson had previously granted the United States an easement to use and maintain a road on the ranch, but the Bureau of Land Management had failed to record it. After Bureau employees realized their mistake, they phoned the respondent and "demanded an easement to replace Nelson's." The respondent refused, and over the next several years, he alleges that Bureau employees "carried on a campaign of harassment and intimidation aimed at forcing him to regrant the lost easement." The respondent filed the instant suit in 1998, alleging that the petitioners violated his Fourth and Fifth Amendment rights under *Bivens v. Six Unknown Fed. Narcotics Agents*,[33] which "held that the victim of a Fourth Amendment violation by federal officers had a claim for damages." The respondent also asserts a RICO claim. The Court begins with a brief examination of *Bivens*, noting that "in most instances we have found a *Bivens* remedy unjustified." The Court finds that the respondent "has an administrative … process for vindicating virtually all of his complaints," but the Court notes that this does not expressly preclude the creation of a new constitutional cause of action. The respondent alleges that while he may have had some remedy for most of the individual incidents, the Bureau's conduct amounted to "'death by a thousand cuts'" and should be treated as a whole. The Court agrees that "[t]he whole here is greater than the sum of its parts" but feels that respondent's claim is essentially that the government "went too far" and notes the inherent difficulty of line-drawing in such cases. Therefore, the Court rejects the respondent's proposed *Bivens* cause of action, finding that it might "be worse than the disease." RICO makes it illegal for certain organizations to engage in a "'pattern of racketeering activity,'" including violations of the Hobbs Act. The Court finds that at the time the Hobbs Act was passed, the crime of extortion dealt mostly with public corruption and not "the harm caused by overzealous efforts to obtain property on behalf of the Government." For this reason, the Court also dismisses the respondent's RICO claim.

A 5-4 Court . . . held that the AEDPA's tolling period for state post-conviction procedures does not continue to toll during . . . certiorari petitions.

FEDERAL HABEAS CORPUS

A 5-4 Court in *Lawrence v. Florida*,[34] held that the AEDPA's tolling period for state post-conviction procedures does not continue to toll during U.S. Supreme Court certiorari petitions. The petitioner Gary Lawrence was convicted of murder and sentenced to death. The Florida Supreme Court affirmed the sentence, and the Court denied certiorari on January 20, 1998. 364 days later, the petitioner filed a petition for post-conviction relief and was denied. He again petitioned the Court for certiorari, and while this was pending, he also filed a federal habeas application. The Court denied certiorari on March 24, 2003. The petitioner's habeas claim was dismissed in the District Court as untimely under AEDPA section 2244(d), which contains a one-year statute of limitations for habeas relief from the judgment of a state court. Section 2244(d)(2) states that this "limitations period is tolled while an 'application for State post-conviction or other collateral review … is pending.'" The District Court concluded that this period does not toll during a petition for certiorari. The District Court held that the limitations period had run because the petitioner waited 364 days before filing his petition for postconviction relief and then an additional 113 before filing his habeas petition. The Court begins its analysis by stating that the real issue "is whether the limitations period was also tolled during the pendency of Lawrence's petition for certiorari to this Court." The Court feels that a natural reading of the statute's language only includes the state-court review process and that the Court is clearly not part of this process. The Court further reasons that under the petitioner's reading of the AEDPA, no "state prisoner could exhaust state postconviction remedies without filing a petition for certiorari." However, the Court has previously held that state procedures are exhausted "at the end of state-court review." The Court concludes by noting that the petitioner's position would "provide incentives for state prisoners to file certiorari petitions as a delay tactic."

32. 127 S. Ct. 2588 (2007).
33. 403 U.S. 388 (1971).
34. 127 S. Ct. 1079 (2007).

[R]espondent's repeated requests that his counsel not present mitigating evidence at his sentencing hearing provided sufficient reason . . . to deny his habeas petition.

In *Schriro v. Landrigan*,[35] a 5-4 Court held that the respondent's repeated requests that his counsel not present mitigating evidence at his sentencing hearing provided sufficient reason for the District Court to deny his habeas petition. The respondent Jeffrey Landrigan was convicted of theft, second-degree burglary, and felony murder. At sentencing, his counsel attempted to submit mitigating evidence in the form of testimony from the respondent's ex-wife and his mother, but at the respondent's request, "both women refused to testify." The respondent also interrupted when other mitigating evidence was brought in by his counsel and told the judge to "'bring on'" the death penalty. The respondent was sentenced to death. Citing the ineffective-assistance-of-counsel standard set forth in *Strickland v. Washington*,[36] a District Court refused the respondent an evidentiary hearing, finding that he could not make a "colorable claim" because he "could not demonstrate that he was prejudiced by any error his counsel may have made." The Ninth Circuit reversed. The Court begins by addressing the Ninth Circuit's application of the AEDPA. The Ninth Circuit concluded that the state court's finding that the respondent "instructed his counsel not to introduce any mitigating evidence," was an "'unreasonable determination of the facts.'" Reviewing the record, the Court cites several instances of the respondent informing his counsel not to present mitigating evidence and concludes that "the Arizona postconviciton court's determination of the facts was reasonable." The Court finds that "[i]f Landrigan issued such an instruction, his counsel's failure to investigate further could not have been prejudicial under *Strickland*" and "the District Court was well within its discretion to determine that … [he] could not develop a factual record that would entitle him to habeas relief." The Court concludes that the Ninth Circuit "erred in holding that the District Court abused its discretion in declining to grant Landrigan an evidentiary hearing."

In *Uttecht v. Brown*,[37] a 5-4 Court, in a decision delivered by Justice Kennedy, held that the Ninth Circuit failed to give proper deference to state-court determinations that a particular juror would be substantially impaired in performing his or her juror duties. The respondent Cal Coburn Brown was sentenced to death in the State of Washington, and the Washington Supreme Court affirmed his sentence. He petitioned a District Court for a writ of habeas corpus and was denied. The Ninth Circuit reversed, holding that "the state trial court had violated Brown's Sixth and Fourteenth Amendment rights by excusing" Juror Z on the grounds that he "could not be impartial in deciding whether to impose a death sentence." The Court begins with an examination of *Witherspoon v. Illinois*,[38] which held that "'a sentence of death cannot be carried out if the jury that imposed … it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty.'" However, the Court points out that *Wainwright v. Witt*[39] adopted a looser standard for excluding veniremen: "'[W]hether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" The Court next analyzes the *voir dire* in respondent's case, finding that Juror Z "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." The Court also notes that with regard to the State's challenge to Juror Z and "[b]efore the trial court could ask [the respondent] for a response, the defense volunteered, 'We have no objection,'" and Juror Z was subsequently excused. The Court rejects the Ninth Circuit's holding that Juror Z was not substantially impaired and concludes that "the trial court acted well within its discretion in granting State's motion to excuse Juror Z." In conclusion, the Court holds that "[c]ourts reviewing claims of *Witherspoon-Witt* error, … especially federal courts considering habeas petitions, owe deference to the trial court."

In *Fry v. Pliler*,[40] the Court upheld the Ninth Circuit's determination that the petitioner was required to demonstrate substantial and injurious effect from the trial court's decision to exclude testimony. The petitioner John Francis Fry was convicted by a jury of two murders. At trial he attempted to link Anthony Hurtz to the homicide. The trial court excluded the testimony of his witness Pamela Maples, "who was prepared to testify that she had heard Hurtz discussing homicides bearing some resemblance to the murder of the Bells." On appeal, the petitioner contended that the exclusion of Maples's testimony "deprived [him] of a fair opportunity to defend himself, in violation of *Chambers v. Mississippi*…."[41] A federal magistrate judge recommended denying habeas relief because "'there ha[d] been an insufficient showing that the improper exclusion of the testimony … had a substantial and injurious effect on the jury's verdict' under the standard set forth in" *Brecht v. Abrahamson*.[42] The District Court agreed with the magistrate judge, and the Ninth Circuit affirmed. The Court begins its opinion with a discussion of the relevant standards of review under *Chapman v. California*[43] and *Brecht*. *Chapman* "held that a federal constitutional error can be considered harmless only if a court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Brecht* rejected the *Chapman* standard for cases reaching the Court on collateral review and adopted the more "forgiving" standard from *Kotteakos v. U.S.*[44] that an error "is harmless unless it '"had substantial and injurious effect or

35. 127 S. Ct. 1933 (2007).
36. 466 U.S. 668 (1984).
37. 127 S. Ct. 2218 (2007).
38. 391 U.S. 510 (1968).
39. 469 U.S. 412 (1985).
40. 127 S. Ct. 2321 (2007).
41. 410 U.S. 284 (1973).
42. 507 U.S. 619 (1993).
43. 386 U.S. 18 (1967).
44. 328 U.S. 750 (1946).

influence in determining the jury's verdict.'"" Therefore, the question at hand is whether a federal court must apply the *Brecht* standard "even if the state appellate court has not found, as the state appellate court in *Brecht* had found, that the error was harmless beyond a reasonable doubt under *Chapman*." The Court finds that the *Brecht* decision "clearly assumed that the *Kotteakos* standard would apply in virtually all §2254 cases" and concludes that the Ninth Circuit was correct to apply *Brecht*.

In *Bowles v. Russell*,[45] a 5-4 Court held that the Sixth Circuit lacks jurisdiction over the petitioner's habeas appeal because it was filed after the 14-day period allowed by statute, despite a judge's extension of that period to 17 days. The petitioner Keith Bowles was convicted of murder and sentenced to 15 years to life imprisonment. He filed a federal petition for habeas corpus on September 5, 2002. The District Court denied relief on September 9, 2003, and the petitioner did not file a timely notice of appeal. However, on December 12, 2003, the petitioner moved to "reopen the period during which he could file his notice of appeal," relying on Rule 4(a)(6), "which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen…." The District Court granted the petitioner's motion but extended the time period by 17 days instead of the 14 days allowed by Rule 4(a)(6). The petitioner filed his notice 16 days later, within the period granted by the court, but after the 14-day period had elapsed. Beginning its review, the Court finds that the issue at hand is whether the Sixth Circuit "lacked jurisdiction to entertain an appeal filed outside the 14-day window … but within the longer period granted by the District Court." The Court states that it "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional'" and that "courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." Unlike more flexible court-promulgated rules, the Court finds that under Rule 4(a)(6), "Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period…." The Court concludes that the petitioner's failure to meet this statutory deadline deprived the Sixth Circuit of jurisdiction and states that if a rigid rule is unfair, "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."

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45. 127 S. Ct. 2360 (2007).

Jailing Ourselves:
Standards Used for Declaring United States Citizens to Be Enemy Combatants

Joseph Carl Storch

"*We have met the enemy and he is us*"
Walt Kelly, "Pogo"

On a clear, blue September morning in 2001, nineteen men highjacked four commercial airplanes headed toward the West Coast. They crashed two into the World Trade Center in New York City, one into the Pentagon in Northern Virginia, and one into a Pennsylvania field. In the wake of the shocking attack, Congress authorized President Bush to use military force against those who committed the attack, commencing a "war on terror" that still rages today.

The government has fought the "war on terror" on many fronts. The military is engaged in Afghanistan and Iraq; diplomatic overtures have been made to Libya and Pakistan; domestic security is tighter; and safety procedures and citizen values have changed, perhaps permanently. American spies gather intelligence all over the globe while even conversations by United States citizens are monitored by the National Security Agency for their content.[1] During the course of the "war on terror," the United States military and the executive branch have declared hundreds of individuals to be "unlawful enemy combatants." One of these individuals is an American citizen captured overseas, and one is an American citizen captured at an airport in Chicago.

The government has standards for declaring citizens to be enemy combatants. There is a system to determine whether to subject such combatants to the federal courts, or to military tribunals, or to indefinite detention without charge. Unfortunately, for the judiciary and the public, the government has chosen to this point not to share those precise factors, not even with the Supreme Court.[2] The government has declared in a brief to a circuit court that such standards do, in fact, exist.[3] The standards may be classified for national security reasons.[4] Alternatively, the government may have simply failed to make the standards public to this point. In the more than five years since the September 11, 2001 terrorist attacks, we have moved little closer to understanding what factors the executive weighs in calculating whether to detain a United States citizen indefinitely as an enemy combatant. Until the government chooses to share this information with the public, an educated guess of what standards the government uses must be deduced from the few statements thus far made on the subject.

This paper will attempt to determine those standards. The decision likely involves four factors: (1) association with or direct support of terrorist organization(s); (2) possession of intelligence that would aid the United States if divulged via interrogation; (3) continuing threat to the safety of United States citizens or the national security of the United States; and (4) it is in the interest of the United States to detain the person as an enemy combatant.

The government should openly acknowledge and publish its standards. The United States has a storied tradition of making punishment fit the crime and of publishing the standards to which citizens are held. The standards that the United States uses to determine that one of its citizens is an enemy

Footnotes

1. David E. Sanger, *Bush Says He Ordered Domestic Spying*, N.Y. TIMES (Dec. 18, 2005), at 1.
2. "There is some debate as to the proper scope of this term (enemy combatant), and the Government has never provided any court with the full criteria that it uses in classifying individuals as such." Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004).
3. The government offered the Fourth Circuit to submit an ex parte supplemental attachment to its brief of a sealed declaration discussing determination of enemy combatant status that "'specifically delineates the manner in which the military assesses and screens enemy combatants to determine who among them should be brought under Department of Defense Control' and 'describes how the military determined that petitioner Hamdi fit the eligibility requirements applied to enemy combatants for detention.'" The court rejected the declaration and ruled that it should have been submitted to the district court. Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir., 2002). Two *Newsweek* correspondents, Michael Isikoff and Daniel Klaidman, quoting anonymous sources, insist alternatively that there was an "informal system" for detaining American citizens as enemy combatants that was not planned out, but "evolved in fits and starts." Michael Isikoff and Daniel Klaidman, *The Road to the Brig*, NEWSWEEK (Apr. 26, 2004), at 26. They quote an anonymous source, a "top government attorney," as saying, "'There is a sense in which we were making this up as we went along, ... 'You have to remember we were dealing with a completely new paradigm: an open-ended conflict, a stateless enemy and a borderless battlefield.'" *Id.* This article will take the government at its word that such standards do exist and are used in determining whether to detain American citizens as enemy combatants, but have not yet been published for national security or other reasons.
4. Some writers believe that the hidden standards are part of a Bush Administration veil of unprecedented secrecy related to government acts and proceedings. Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1621 (2004) *citing* Detroit Free Press v. Ashcroft, 303 F.3d. 681 (6th Cir. 2002); N.J. Media Group v. Ashcroft, 308 F.3d. 198 (3d Cir. 2002); Ctr. for Nat'l Security Studies v. United States Dep't of Justice, 331 F.3d. 918 (D.C. Cir. 2003).

combatant are not merely important as a diagnostic legal exercise. At stake is America's example to developing democracies of an open, honest, and fair balance of freedom and security. Many nations look to the United States as a model. If the United States hides the standards used to detain citizens, other nations may use that secrecy to justify their own actions.

This article does not analyze the Supreme Court's decisions in *Hamdi* and *Padilla* to determine whether the Court made the right calculus or found the right balance. Nor does this article attempt to parse whether the United States may detain non-citizens indefinitely as enemy combatants or the complex issue of military tribunals. Rather this paper attempts to reveal how the United States justifies detaining her own citizens, sometimes captured on United States soil and sometimes showing little or no signs of imminent harm. If these detentions occur in the shadows, gaining strength and legitimacy in current and future administrations, more and more American citizens may find themselves risking loss of civil liberties. When those who govern have absolute power to detain those that are a threat to their government, they may take liberties with that power. The United States has not yet published the calculus it uses before detaining its own citizens. By determining what those standards are, the public can hold government to the correct application of the standards. Sunlight on the standards may be our "best disinfectant."[5]

I. THREE UNITED STATES CITIZEN ENEMY-COMBATANT CASES

Although there have been hundreds of declared enemy combatants, only two announced detainees are United States citizens. The comparison of the two, Yaser Hamdi and Jose Padilla, as well as John Walker Lindh, a citizen who was not detained as an enemy combatant, may reveal the standards used to determine whether to declare a citizen to be an enemy combatant.

A. Yaser Hamdi

Yaser Esam Hamdi, a Saudi national who was born in Louisiana but left for Saudi Arabia as a young boy, was captured in late 2001 by the Northern Alliance in Afghanistan and was subsequently turned over to the United States military.[6] Hamdi was interrogated and then transported to a United States Naval Base in Guantanamo Bay, Cuba.[7] When the government learned that Hamdi was a United States citizen, it transferred him to a naval brig in Virginia, then to a naval brig in South Carolina.[8] Never charged with a crime, Hamdi remained in confinement until his October 11, 2004, release to Saudi Arabia under a plea agreement.[9] The United States military determined Hamdi to be an unlawful enemy combatant, and the government never brought criminal or civil charges against him.

If the United States hides the standards used to detain citizens, other nations may use that secrecy to justify their own actions.

Hamdi's father, Esam Fouad Hamdi, filed a habeas petition as next friend.[10] In response, the government filed a declaration from Michael Mobbs, special advisor to the undersecretary of defense for policy.[11] The government chose not to provide the specific standards used to determine that Hamdi was an enemy combatant. The only clue to those standards comes from the Mobbs declaration.

After declaring himself familiar with the rules and policy of detention and combatant status and Hamdi's situation in particular, Mobbs wrote that Hamdi traveled to Afghanistan in July or August 2001, affiliated with the Taliban, and received weapons training.[12] Hamdi's unit was captured by the Northern Alliance, to whom he surrendered a Kalashnikov rifle.[13] Hamdi, who spoke English, was interviewed by the United States military and determined to be an enemy combatant, an assessment affirmed by a military screening team.[14] In January 2002, the Commander, U.S. Central Command's Detainee Review and Screening Team found that Hamdi met established enemy-combatant criteria.[15] The declaration does not state what those standards and criteria are.

The Eastern District of Virginia ordered the government to produce certain documents that would validate holding Hamdi as an enemy combatant.[16] The government appealed this decision to the Fourth Circuit, which reversed and dismissed Hamdi's habeas-corpus petition.[17] Hamdi's petition for a rehearing or a rehearing *en banc* was denied, but the Supreme Court granted a writ of certiorari to the Fourth Circuit to hear his appeal.

The Supreme Court's majority opinion in *Hamdi* does not conclusively determine whether the Constitution always provides the executive with detention power. In *Hamdi*, the Court ruled that Congress authorized detention by its Authorization for the Use of Military Force (A.U.M.F.).[18] Though the A.U.M.F. does not specifically authorize detention, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" authorized by the A.U.M.F.[19] Necessary and appropriate force includes detaining Taliban

5. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933).
6. Hamdi, 542 U.S. at 510.
7. *Id.*
8. *Id.*
9. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST (Oct. 12, 2004), at A2.
10. Hamdi v. Rumsfeld, 243 F. Supp.2d 527 (E.D. Va., 2002).
11. Hamdi, 542 U.S. at 512-513.
12. *Declaration of Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy* (Hamdi), CBS NEWS WEBSITE (Jul. 24, 2002), *available at* http://www.cbsnews.com/htdocs/pdf/hamdimobbs2.pdf (last visited Feb. 25, 2007).
13. *Id.*
14. *Id.*
15. *Id.*
16. Hamdi v. Rumsfeld, 243 F. Supp.2d at 528.
17. Hamdi v. Rumsfeld , 316 F.3d. 450 (4th Cir., 2003).
18. Hamdi, 542 U.S. at 517.
19. *Id.* at 519.

Mobbs's declaration reveals the information given to President Bush before he determined Padilla to be an enemy combatant.

members.[20] Detained citizens must receive notice of the reasons for their classification and be heard before a neutral decision maker in a meaningful time and manner to satisfy due-process requirements.[21]

Not long after the Supreme Court reversed and remanded, Yaser Hamdi was freed to Riyadh, Saudi Arabia, as part of a plea bargain that required that he renounce terrorism, surrender his United States passport, agree not to sue the United States government, and refrain from traveling to the United States and other denoted areas for some time.[22]

B. Jose Padilla

Jose Padilla, also known as Abdullah al-Mujahir, the so-called "dirty bomber,"[23] was arrested May 8, 2002, at O'Hare International Airport on a federal material-witness warrant after stepping off of a flight from Pakistan to Chicago.[24] Apparently, Padilla was carrying a valid passport at the time, which he had received two months earlier.[25] He cleared immigration and had his passport stamped "admitted."[26] He was detained at the customs area, where customs agents and then Federal Bureau of Investigation agents questioned him.[27] After declining to continue the interview without the representation of an attorney, he was presented with a subpoena issued in the Southern District of New York.[28] Padilla was brought to New York under federal custody.[29] On June 9, 2002, President Bush directed Secretary of Defense Donald Rumsfeld to designate Padilla an enemy combatant and have him detained.[30]

The government vacated the material-witness warrant and informed the court it was taking Padilla into military custody.[31] The military transported Padilla to the Consolidated Naval Brig in South Carolina.[32] Padilla's attorney, Donna Newman, sought a writ of habeas corpus as next friend, and the district court determined that Padilla had the right to monitored access to counsel and that the government had the right to detain a combatant captured in the United States, in review of which it would apply a "some evidence" standard.[33] The Second Circuit Court of Appeals affirmed the district court ruling on jurisdiction over Secretary of Defense Donald Rumsfeld, but reversed on the merits, stating that although it would grant the executive great deference, the President did not have congressional authority to detain Padilla; the Second Circuit remanded with instructions to transfer Padilla to civil authorities for criminal charges.[34] On certiorari, the Supreme Court did not reach the merits of whether the President could detain American citizens captured within the United States as enemy combatants, but instead remanded to the district court to dismiss without prejudice due to lack of jurisdiction.[35] The Court ruled that the commander of Padilla's brig was the proper respondent to a habeas-corpus motion.[36]

Like in Hamdi's petition, the government submitted a declaration from Michael Mobbs. Mobbs recited his qualifications within the government and said that he had reviewed Padilla's file.[37] Mobbs's declaration reveals the information given to President Bush before he determined Padilla to be an enemy combatant. Padilla was born in New York, convicted of murder in approximately 1983, and imprisoned until age 18, after which he was convicted of a handgun charge and imprisoned.[38] Padilla converted to Islam in prison.[39] He traveled to Egypt, Pakistan, Saudi Arabia, and Afghanistan, where he associated with members and leaders of Al Qaida and met with Abu Zubaydeh (a senior lieutenant of Osama bin Laden).[40] Along with an unnamed associate, Padilla "approached Zubaydeh with their proposal to conduct terrorist operations within the United States. Zubaydeh directed Padilla and his associate to travel to Pakistan for training from Al Qaida operatives in wiring explosives."[41] Padilla researched uranium-enhanced explosives and planned to "build and detonate a 'radiological dispersal device' (also known as a dirty bomb) within the United States, possibly in Washington, DC."[42] This plan was still in the planning stages and Padilla had other plans to explode gas stations and hotel rooms.[43] The declaration does not reflect Padilla's ability to actually carry out any of the discussed operations, how close he was to beginning his operations, or whether the information and training he had received

20. *Id. at 521.*
21. *Id.* at 533.
22. *See* Markon, *supra* note 9, at A2.
23. Tony Karon, *Person of the Week: Jose Padilla*, TIME, Online Edition (Jun. 14, 2002) *available at* http://www.time.com/time/pow/article/0,8599,262269,00.html (last visited Feb. 25, 2007).
24. Rumsfeld v. Padilla, 542 U.S. 426, 430-431 (2004).
25. Joseph Kubler, *U.S. Citizens as Enemy Combatants; Indication of a Roll-Back of Civil Liberties or a Sign of our Jurisprudential Evolution?*, 18 ST. JOHN'S J.L. COMM. 631, 645-646 (2004), *citing* Bob Drogin, *Dirty Bomb Probe Widens*, L.A. TIMES (Jun. 11, 2002), at 1; Chisun Lee, *Sticking Up for the Dirty Bomber*, VILLAGE VOICE (Oct. 15, 2002), at 25.
26. Padilla v. Hanft, 389 F. Supp.2d. 678, 681 (D.S.C., 2005).
27. *Id.*
28. *Id.*
29. Padilla, 542 U.S. at 430-431.
30. Padilla v. Rumsfeld, 352 F.3d 695, Appendix A (2d Cir., 2003).
31. Padilla, 542 U.S. at 431.
32. *Id.* at 432.
33. Padilla v. Bush, 233 F. Supp.2d 564, 581-599 (S.D.N.Y. 2002).
34. Padilla, 352 F.3d at 710-724.
35. Padilla, 542 U.S. at 451.
36. *Id.* at 442.
37. *Declaration of Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy* (Padilla) (Aug. 27, 2002) CBS NEWS WEBSITE, *available at* http://www .cbsnews.com/htdocs/pdf/padillamobbs.pdf (Last visited Feb. 25, 2007).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

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In August 2007, Padilla was convicted in a federal jury trial inFlorida on terrorism conspiracy charges.

from Al Qaeda was anything more than common knowledge about explosives.

In July 2004, Padilla filed a petition for habeas corpus in the District of South Carolina, where he was still being held in a military brig.[44] The district court found that while the A.U.M.F. made Hamdi's detention on the battlefield of Afghanistan appropriate, detaining Padilla in a United States airport was not equally appropriate.[45] Padilla, captured domestically, had his terrorist plans thwarted by the capture, and there "were no impediments whatsoever to the government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing."[46] The court listed several federal laws that the government could use to prosecute Padilla, instead of endless detention.[47] The district court thus concluded that the A.U.M.F. did not authorize detention of an American citizen captured domestically and that this enemy-combatant detention violated the non-detention act.[48]

The Fourth Circuit disagreed. In reversing the district court, the circuit concluded that the President possesses authority to detain a United States citizen captured domestically as an enemy combatant pursuant to the A.U.M.F.[49] The court went on to find no "difference in principle" between Hamdi and Padilla.[50] In reversal, the circuit court denied that the simple availability of the criminal laws cited by the district court is determinative of the detention power "if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place—the prevention of return to the field of battle."[51] The court added that requiring the government to use the criminal-justice system would "impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined."[52]

Padilla appealed to the Supreme Court, and the case seemed on a sure track to consideration when the government indicted Padilla in a federal court in Miami, Florida, and sought his transfer from military detention to the federal prison system. The indictment did not repeat the familiar accusation that Padilla would attempt to detonate a "dirty bomb" in an American city, but instead argued that he was part of a "'North American support cell' to send 'money, physical assets and new recruits overseas to engage in acts of terrorism and that he had traveled abroad himself to become 'a violent jihadist.'"[53]

The Fourth Circuit did not take kindly to the government's decision to place Padilla in the civilian criminal-justice system after its strong opinion upholding the government's right to detain United States citizens as enemy combatants. The judges refused to approve Padilla's transfer, calling that transfer and the request that the Fourth Circuit withdraw its opinion a compounding of "what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court."[54] The opinion excoriated the government at several different points for an apparent effort to avoid the potential that the Supreme Court would reverse the earlier Fourth Circuit decision and further restrict the government's power to detain United States citizens.[55] The Supreme Court reversed and ordered that the unopposed request to transfer Padilla to civilian custody be approved; the Court said that it would "consider the pending petition for certiorari in due course," but later denied certiorari.[56] In August 2007, Padilla was convicted in a federal jury trial in Florida on terrorism conspiracy charges.[57]

C. John Walker Lindh

American citizen John Walker Lindh was captured in Afghanistan on December 1, 2001, fighting for the Taliban against the Northern Alliance, a United States ally.[58] Lindh grew up in affluent Marin County, California, and was named after Beatles singer John Lennon and United States Supreme Court Justice John Marshall.[59] Between the ages of 16 and 18, Lindh converted to Islam, referred to himself as Sulayman Al-Lindh, and left for Yemen to learn the language of the Koran.[60] Lindh's parents supported him on this journey.[61]

A month after the U.S.S. Cole was bombed,[62] Lindh left

44. Padilla, 389 F. Supp.2d. at 682.
45. *Id.* at 686.
46. *Id.*
47. *Id.* at 691-692.
48. *Id.* at 688.
49. Padilla v. Hanft, 423 F.3d. 386, 389 (4th Cir., 2005).
50. *Id.* at 391.
51. *Id.* at 394-395.
52. *Id.* at 395.
53. David Stout, *U.S. Indicts Padilla After 3 Years in Pentagon Custody*, N.Y. TIMES (Nov. 22, 2005) *available at* http://www.nytimes.com/2005/11/22/politics/22cnd-terror.html?ex=1136610000&en=827b54a3132d12fb&ei=5070 (last visited Feb. 25, 2007).
54. Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir., 2005).
55. *Id.* at 583-587.
56. Hanft v. Padilla, 546 U.S. 1084 (2006); Padilla v. Hanft, 547 U.S. 1062 (2006).
57. Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES (Aug. 17, 2007), *available at* http://www.nytimes.com/2007/08/17/us/17padilla.html (last visited Dec. 15, 2007).
58. United States v. Lindh, 212 F. Supp.2d 541, 547 (E.D. Va. 2002).
59. Josh Tyrangiel, *The Taliban Next Door: At 16, John Walker Was a Quiet California Kid. At 20, He Was a Taliban Warrior. How Did He Get from Marin County to Mazar-i-Sharif?* TIME ONLINE EDITION (Dec. 9, 2001), *available at*, http://www.time.com/time/nation/article/0,8599,187564,00.html (last visited Feb. 25, 2007).
60. *Id.*
61. *Id.*
62. The United States Navy Destroyer Cole was bombed while refueling in Yemen. Jose Martinez, *MIDEAST CRISIS; Tight-knit Naval Community Reels from Sad News,* THE BOSTON HERALD (Oct. 13, 2000), at 34.

Yemen to attend an Islamic Madrasah in Bannu, Pakistan.[63] Lindh trained in a camp in Pakistan of the Harakat ul-Mujahideen (designated in 1997 by the United States as a foreign terrorist organization) as well as other training camps.[64] He met and spoke with Osama bin Laden, but when asked, chose to decline an offer to participate in bombing operations against the United States, Israel, and Europe.[65] Lindh received weapons training and training in "orientating, navigation, explosives, and battlefield combat."[66] When he was captured, Lindh was interrogated but was not declared an enemy combatant. Instead, he was transported to the United States and charged with a 10-count federal indictment in the Eastern District of Virginia.[67] The district court denied Lindh's motion to be treated as a lawful combatant, reasoning that on February 7, 2002 (after Lindh's capture), the President had declared all members of the Taliban to be unlawful combatants as he was authorized to do by the "Authorization for Use of Military Force."[68] Rather than go to trial, Lindh and the government reached a plea bargain reflected in his October 4, 2002 sentencing.[69]

II. STANDARDS AND CRITERIA USED BY THE U.S. TO DETERMINE ENEMY-COMBATANT STATUS

After the September 11, 2001, attacks, the executive established rules and standards for detaining enemy combatants. It had been many years since a citizen was declared an enemy combatant, and that was a different situation. In World War II, America had clear enemies with uniformed armies and territory. Conversely, the "war on terror" is linguistically a war on a tactic (terrorism), not a war against a nation or people (Afghanistan or Southern Confederates).

The government has admitted that "'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.'"[70] The "war on terror" is a war that will have no clear end. Soon after the attacks, the White House made a clear statement on detention, treatment, and trial of *noncitizens* captured as part of the "war on terror,"[71] but did not publish standards about detention, treatment, or trial of similarly captured *citizens*. The executive branch's only other published standards also involve only noncitizen enemy combatants.[72] In the Military Commissions Act of 2006,[73] Congress defined unlawful enemy combatants[74] for the purpose of exposure to trial by military commissions[75] and removal of habeas-corpus jurisdiction,[76] but only as applied to alien unlawful-enemy combatants.

It had been many years since a citizen was declared an enemy combatant, and that was a different situation.

The President's advisors likely constructed the authority to detain citizens as enemy combatants based on the Court's *Quirin* decision, which stated "[c]itizenship in the United States of an enemy belligerent does not relieve him of the consequences of a belligerency which is unlawful because in violation of the law of war."[77] While the standards for declaring a citizen to be an enemy combatant have not been published, former Attorney General and Counsel to the President Alberto Gonzalez discussed the system in place to determine status of citizens. The Department of Justice "first reviews each case to determine whether a citizen meets the criteria to be an 'enemy combatant.' After that . . . the secretary of defense and the CIA both review the case, and then turn it back to the attorney general for a second review" by Justice.[78] There is a separate factual review by the Criminal Division of the Justice Department, after which the attorney general provides legal advice to the defense secretary on enemy-combatant classification.[79] A package is sent to the President for a final decision on enemy-combatant status.[80] Gonzalez claimed in his speech that there was no "rigid process for making [enemy-combatant] determinations."[81] Though Gonzalez described the system for making

63. *Id.*
64. United States v. Lindh, 227 F. Supp.2d 565, 567-569 (E.D. Va. 2002).
65. *Id.*
66. Lindh, 212 F. Supp.2d at 546.
67. *Id.* at 546-547. The ten counts, including charges of conspiracy, providing material support and resources to three terrorist groups, and using and carrying firearms are listed at 547.
68. *Id.* at 554-555.
69. Lindh, 227 F. Supp.2d at 572. Lindh was sentenced to 240 months in federal prison in or near California, less time served, plus three years of supervised release.
70. Hamdi, 542 U.S. at 520, *quoting* Brief For Respondent at 16.
71. George W. Bush, *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, The White House, Office of the Press Secretary (Nov. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited Feb. 25, 2007).
72. *Guantanamo Detainee Processes*, United States Department of Defense: Combatant Status Review Tribunals *available as download (Microsoft Word Format) at* http://www.defenselink.mil/news/Combatant_Tribunals.html (last visited Feb. 25, 2007).
73. 109 Public Law 366, 120 Stat. 2600 (2006).
74. 10 U.S.C. § 948a (2006).
75. 10 U.S.C. § 948c, 948d (2006).
76. 28 U.S.C. § 2441 (2006).
77. Ex Parte Quirin, 317 U.S. 1, 37 (1942).
78. James Park Taylor, *Singularity: We Have Met the Enemy and He Is Us: A Legal Guide to U.S. Citizens as "Enemy Combatants,"* 20 MONTANA LAWYER 8, 30-31 (2004), *quoting* Alberto Gonzalez, Counsel to the President, *Remarks Before the American Bar Association Standing Committee on Law and National Security*, Washington, DC (Feb. 24, 2004) at 7-10. *Available at* http://www.abanet.org/natsecurity/judge_gonzales.pdf (last visited, Jan. 5, 2005).
79. *Id.*
80. Alberto Gonzalez, Counsel to the President, *Remarks Before the American Bar Association Standing Committee on Law and National Security*, Washington, DC (Feb. 24, 2004) at 9. *Available at* http://www.abanet.org/natsecurity/judge_gonzales.pdf (last visited, Jan. 5, 2005).
81. *Id.* at 7.

It is unclear what level of association or support of a terroristgroup is necessary to trigger enemy-combatant status.

the determination and how different segments of the executive branch communicate in making the determination, he did not detail the standards that the executive branch uses in making the determinations. That most important aspect still remains veiled from the public's view.

The executive believes that statutory authority to detain citizens as enemy combatants derives from two statutes, the "Authorization for Use of Military Force"[82] and "Armed Forces General Military Law: Military Correctional Facilities."[83] In 1971, Congress amended the United States Code in this area because, in looking back at what happened to Japanese-Americans in internment camps, it wished to declare the intent of Congress that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[84] The *Hamdi* Court accepted the argument that detention of individuals declared to be enemy combatants for the duration of the conflict during which they are captured is part of the President's authorized use of military force.[85] This article, accepting the Court's analysis that the executive has such a power, concentrates on the standards used to apply the power.

Although the standards have not been published or made available, an analysis of the accusations against citizen enemy combatants seems to yield four factors that the executive considers in making a determination that a citizen is an enemy combatant. Those factors are: (1) association with or direct support of terrorist organization(s); (2) possession of intelligence that would aid the United States if divulged via interrogation; (3) continuing threat to the safety of United States citizens or the national security of the United States; and (4) it is in the interest of the United States to detain as an enemy combatant.

A. Factor I: Association with or Direct Support of Terrorist Organization(s)

It is unclear what level of association or support of a terrorist group is necessary to trigger enemy-combatant status. It is also unclear whether this factor violates the First Amendment right to association.[86] Padilla is alleged to have met with Al Qaeda leaders and plotted ways to trigger a dirty bomb in an American city. Hamdi is alleged to have fought for the Taliban, but there is no evidence that he affiliated with Al Qaeda. In contrast, Lindh trained with Harakat ul-Mujahideen and met with Al Qaeda leader Osama bin Laden. It is not apparent why Hamdi's association with the Taliban triggered enemy-combatant status while Lindh's association with two declared terrorist groups, one of which attacked America on September 11, did not. Though association with or support of a terrorist organization seems to be a factor that the government considers in determining whether to detain a United States citizen as an enemy combatant, the amount of contact or support necessary to trigger this determination is unclear from the small sample of cases discussed here.

B. Factor II: Possession of Intelligence That Would Aid the United States If Divulged

The Supreme Court, in dicta,[87] has hinted that the mere possibility of interrogation may not be sufficient for indefinite detention of an enemy combatant: "Certainly, we agree that indefinite detention for the *purpose of interrogation* is not authorized."[88] This is curious, as the Fourth Circuit understood that it was because the government believed "that Hamdi's detention is necessary for intelligence gathering efforts, [that] the United States has determined that Hamdi should continue to be detained as an enemy combatant in

82. 107 Public Law 40, 115 Stat. 224 (2001). The A.U.M.F. was passed on September 18, 2001, seven days after the attacks. *See* Stephen I. Vladeck, *The Detention Power* 22 YALE L. & POL'Y REV. 153, 184-187 (2004) (discussing amendments made to the A.U.M.F. by the Senate before passage, which removed the language "to deter and pre-empt any future acts of terrorism or aggression against the United States" and arguing that the A.U.M.F. does not allow for detentions of anyone, especially not U.S. citizens).
83. 10 U.S.C. § 956(5) (2004). *See* Vladeck, *supra* note 82, at 187-192 (detailing the statutory history of 10 U.S.C. § 956 and revealing that the language used relating to prisoners and persons in custody has been in use since before the 1971 enactment of 18 U.S.C. 4001(a), and, in fact, the language was "first codified in an emergency supplemental appropriations act passed…on December 17, 1941, just ten days after Pearl Harbor," necessary because on December 12, 1941, President Roosevelt had issued an executive order relating to national defense, which would eventually take the form of Executive Order 9066, authorizing the creation of military areas to restrict the movement of Japanese-Americans). That is to say that some of the original prisoners that 10 U.S.C. section 956 were enacted to control were American citizens of Japanese descent being held in internment camps. Half a century later, the government is using the descendent of that statute to validate detention of American citizens. *See Generally* Nat Hentoff, *Op-Ed Sweet Land of Liberty* WASH. TIMES (Sep. 9, 2002), at A19; Anita Ramasastry, *Why Ashcroft's Plan to Create Internment Camps for Alleged Enemy Combatants Is Wrong*, Find Law Forum, CABLE NEWS NETWORK WEBSITE (Sept. 4, 2002), *available at*, http://archives.cnn.com/2002/LAW/08/columns/fl.ramasastry.detainees/ (last visited, Feb. 25, 2007); Jess Bravin, *More Terror Suspects May Sit in Limbo*, WALL ST. J. (Aug. 8, 2002), at 4 (discussing Attorney General John Ashcroft's short-lived plan in 2002 to create internment camps within the United States to house citizens who would be declared enemy combatants).
84. 18 U.S.C. 4001 (2004).
85. Hamdi, 542 U.S. at 519-524.
86. *See Generally* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (discussing the government's tactics in the "war on terror" as an "evolution of political repression" and detailing the manner in which these restrictions may violate the First Amendment right to assemble).
87. Since this is dicta, and not an issue decided in the *Hamdi* ruling, this may not be the final word on the subject.
88. Hamdi, 542 U.S. at 521 (emphasis added).

accordance with the laws and customs of war."[89] The government should cite another purpose besides that of interrogation if they are to hold an enemy combatant indefinitely without charge or trial. This dicta was written after both Hamdi and Padilla were declared to be enemy combatants, so it is possible that interrogation *was* the sole purpose for detaining one or both as enemy combatants, but that standard alone should not be used *prospectively* to detain citizens as enemy combatants.

In the same opinion, the Court acknowledged the "weighty and sensitive governmental interest in ensuring that those who have in fact fought with the enemy during a war *do not return to battle* against the United States."[90] This statement values detention in the case of a ticking time-bomb-type detainee over the simple intelligence value of a detainee.

It is noteworthy that there is no public record of other citizens being declared enemy combatants in the years after Hamdi and Padilla were detained, even though others were arrested while planning or attempting to execute attacks or for aiding or supporting terrorist groups.

Though there is no conclusive evidence that this is the case, perhaps the mere threat of being declared an enemy combatant is enough to encourage a captured citizen to cooperate and provide any information the government desires, lest they be swept off to a military brig in South Carolina. Simple human nature may cause a detainee to choose to assist the government and take their chances in the civilian criminal-justice system, rather than risk refusing to cooperate and facing enemy-combatant detention in a military brig.

It is an open question whether such a threat, if it is used or implied, is proper. While citizens faced with the possibility of being held incommunicado may be more likely to provide information that can be used to protect and save lives, there are two dangers that may accompany such protection. One danger is the loss of the Fifth Amendment right to avoid self-incrimination,[91] which is eviscerated by such a threat. While those being interrogated still have the right to remain silent, doing so may cost them other constitutional rights, and so may not be a practical option. The other danger is a creeping expansion of the use of the threat.[92] There is no clear backstop for which the *threat* of a declaration of enemy combatant status could not be used to soften up a suspect. If the government arrests a petty thief and member of a local Islamic organization that has sent funds to al Qaeda, who possesses intelligence about the organization, the threat of enemy-combatant detention could be used to force an allocution and plea. Although the charge, burglary or larceny, may have nothing to do with the suspect's beliefs on terrorism or his financing of terrorist organizations, he would fit all the parameters discussed earlier: association with and support of a terrorist organization, possession of intelligence that would aid the United States if divulged, continued threat to safety of United States citizens, and detention being in the interest of the United States. We must carefully draw the line to ensure that criminals who are not themselves terrorists are not threatened with a declaration of enemy-combatant status.

It is difficult for the government to determine with certainty that a person is a continuing threat, and it is just as difficult to determine when that person is no longer a threat.

C. Factor III: Continuing Threat to the Safety of United States Citizens

It is difficult for the government to determine with certainty that a person is a continuing threat, and it is just as difficult to determine when that person is no longer a threat. This factor, like that of "association" or "support of a terrorist organization," is mainly gray area. No available standards reveal just how dangerous a threat must be to require detention.

Could it be that the level of threat a person presents requires a crude cost-benefit-type analysis that involves multiplying the number of people in danger by the time remaining until their harm? At a certain level, the amount of harm multiplied by its imminence is so grave that the government must detain the citizen indefinitely. Yet it is not clear how the government could value each factor. Would they first detain a terrorist who will kill ten people in one hour, one who would kill 100 people in a year, or one who would kill 1,000 people in ten years? Which presents the greater threat to society? How can the government determine when the threat has passed?

If the person possesses knowledge that continues to present a danger no matter how long he or she is detained,[93] may the government detain that person for life without adjudication? The executive may feel it has no choice. Since presentation of continuing danger is extremely subjective, the government must reveal its standards so as to ensure honest and consistent application.

89. Hamdi, 296 F.3d. at 280.
90. Hamdi, 542 U.S. at 531 (emphasis added).
91. U.S. CONST., amend. V. ". . . nor shall [a person] be compelled in any criminal case to be a witness against himself . . . ."
92. *See* Chemerinsky, *supra* note 4, at 1621-1630, 1642-1643 (2004) (discussing erosion of the bright line between government powers previously used only in foreign operations, and their application by the Bush Administration to domestic actions, and listing examples). *See also* Taylor, *supra* note 78, at 28-29 (2004) (the government's position, during oral arguments in *Padilla*'s Second Circuit hearing, was that since al Qaeda attacked in the United States, the United States should be included in the "war on terror" battlefield); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 429 (2003) ("In previous American conflicts, hostilities were limited to a foreign battlefield while the United States' home front remained safe behind two oceans. In this conflict, the battlefield can occur anywhere, and there can be no strict division between the front and home").
93. For instance, knowledge of chemical, biological, or nuclear weapons and the ability to utilize that knowledge toward imminent destructive ends would represent a continuing threat.

Several other citizens of equal or greater danger and intelligence value were tried in federal courts.

D. Factor IV: Detention Is in the Interests of the United States

This final factor is the scariest for civil libertarians and open-government supporters. It is nearly impossible to quantify when the "interests" of the United States merit detaining a citizen as an enemy combatant. The fourth factor may even subsume the first three. This factor, when combined with the other abstract factors, provides the government with too much leniency in making a determination. If the President is empowered to determine both *what* the standards are for the interests of the United States and *who* among us fit the standards, he or she acts as legislator, executive, and judiciary. Too much power is concentrated in the executive branch in making such determinations using broad, unpublished standards.

Some argue that the government detained Hamdi and Padilla as enemy combatants because they did not have sufficient evidence to ensure a conviction in an Article III court.[94] The secrecy that surrounded the two detained citizens leaves no public record of the evidence that the government had on either man outside of the Mobbs declarations. Others who associate or support terrorist organizations, or have intelligence value, or are a continuing threat to the United States, have been tried in federal courts. Yet Hamdi and initially Padilla were not.

The only evidence the government initially provided, even to the Supreme Court, was a declaration that was essentially a hearsay review of the detainee's files, meaning that it was possible that the government did not have enough evidence on either man to satisfy federal evidentiary requirements. This would be a drastic accusation against the government, but Hamdi's release soon after the Supreme Court ruled that he had a right to judicial review certainly does not negate it. Padilla's transfer to a civilian court in Florida to face a federal indictment just before the government's briefs were due in his appeal to the Supreme Court seemed not to, either, but he has since been convicted of conspiracy to commit several terrorist acts.

In both cases, the government argued vehemently that it must detain these individuals, in military prisons and without access to counsel, because of their grave danger to society. Yet in both cases, when it appeared as though the courts would find a lack of evidence or force the government to defend these detentions, the government quickly shifted course and either released the detainee or transferred them back to the civilian criminal-justice system that it had previously called unequipped to handle such a detainee. If history proves this theory correct in documents released in the future and memoirs written by today's decision makers, many Americans may lose faith in our system of justice. Few would trust an executive branch that perversely seeks to indefinitely detain citizens for which it *does not* have evidence sufficient to try and convict in the civilian criminal-justice system.

To this end, Hamdi and Padilla are not the only individuals accused of nefarious acts and attempted acts of terrorism. Several other citizens and noncitizens of equal or greater danger and intelligence value were tried in federal courts. Both Richard Reid, who attempted to destroy an American Airlines flight from Paris to Miami via a crudely made shoe bomb,[95] and his accomplice, Saajid Badat, who possessed explosives in his home and allegedly assisted Reid while planning his own shoe bombing at a later date,[96] were arrested and charged in federal court. Ryan Anderson, a member of the National Guard, was arrested before deployment to Iraq on "criminal charges of aiding the enemy by wrongfully attempting to communicate and give intelligence to the al Qaeda terrorist network."[97] Yassin Muhiddin Aref and Mohammed Mosharref Hossain, members of a mosque in Albany, New York, who were accused of attempting to sell to terrorists a shoulder-fired grenade launcher, were charged in federal court with "concealing material support for terrorism and participating in a money-laundering conspiracy."[98] Gale Nettles, a convicted felon who used the name Ben Laden, was arrested and charged in federal court after filling a rented storage facility with 500 pounds of fertilizer that he intended to use to bomb the Dirksen Federal Courthouse building in Chicago, a clear attempt at domestic terrorism.[99] Ramzi Yousef, convicted in federal court for masterminding the 1993 truck bombing of the World Trade Center, was never declared to be an enemy combatant, although Deputy Secretary of Defense Paul Wolfowitz wished to have him so declared.[100]

It is a mystery why these individuals, some of whom were further along in planning a terrorist act, or even caught in the

94. *Newsweek* correspondents Michael Isikoff and Daniel Klaidman reported based on anonymous sources that after Padilla was arrested at O'Hare airport and transported to New York on a material-witness warrant, "prosecutors soon realized they didn't have enough evidence to charge him with any crime. To avoid releasing him, Bush decreed on June 9 that Padilla, too, was an enemy combatant. He was sent to a military brig in South Carolina." Isikoff and Klaidman, *supra* note 3, at 26.
95. Fred Bayles, *Judge to Bomber: You're No Big Deal*, USA TODAY (Jan, 31, 2003), at 1A.
96. Associated Press, *Alleged Conspirator Charged*, WASH. POST (Oct. 5, 2004), at A02.
97. CBS/Associated Press, *Army: GI Wanted to Help Al Qaida*, CBS NEWS WEBSITE, (Feb. 13, 2004) *available at* http://www.cbsnews.com/stories/2004/02/12/national/main599982.shtml (last visited, Feb. 25, 2007).
98. Jonathan Finer and Dan Eggen, *Two Leaders of Mosque Arrested in Albany Sting*, WASH. POST (Aug. 6, 2004), at A03.
99. Matt O'Connor and Glenn Jeffers, *FBI Aids Suspect in Catching Himself: An Ex-Con Is Accused of Plotting to Blow up the Dirksen Building, but U.S. Agents Were Clued in from the Start,* CHIC. TRIB. (Aug. 6, 2004), at 1.
100. Michael Isikoff and Mark Hosenball, *The Enemy Within: How the Pentagon Considered Expanding its Controversial 'Enemy Combatant' Label in a Bid to Prove Links between Iraq and Al Qaeda*, NEWSWEEK WEB EXCLUSIVE (Apr. 21, 2004), *available at* http://msnbc.msn.com/id/4799686/ (last visited Feb. 25, 2007).
101. The District of South Carolina addressed this issue in its *Padilla*

act, like the "shoe bomber" Reid, were not declared enemy combatants. Perhaps an aspect of Padilla's detention was so dangerous that if revealed, it would present a grave danger. Perhaps that danger has passed, allowing Padilla to be tried in federal court. Perhaps the evidence initially used to hold Padilla as an enemy combatant was insufficient to attain a conviction in federal court. Or perhaps a threat of an enemy-combatant declaration has been sufficient to elicit cooperation from all others arrested in the "war on terror."

III. SHOULD THE UNITED STATES GOVERNMENT DETAIN CITIZENS AS ENEMY COMBATANTS?

The short answer to this question should be no. The United States has a strong legal and judicial system, a system that is well capable of protecting the state's interest in safety from terrorism while safeguarding the rights of the detained.[101] Justice Scalia's dissenting opinion in *Hamdi* argued that the A.U.M.F. did not authorize enemy-combatant detention, and it further cited several statutes that federal prosecutors could use against citizen terrorists and suspected terrorists instead of detaining them as enemy combatants.[102] Some accused terrorists captured by the United States or allied governments have been successfully prosecuted in Article III courts. These courts have capably balanced the sensitivity of the defendant's potentially dangerous knowledge and presentation of continuing danger with their constitutionally guaranteed rights to a fair and speedy trial and representation by counsel.

The secretive standards for detaining United States citizens as enemy combatants, on the other hand, are filled with pitfalls and dangers to both public safety and civil liberties. Some of the problems with secretive enemy-combatant detention come from denying citizens the civil liberties that we have come to expect in this country. Yet there is the additional public-relations problem, both within the United States and outside of its borders. Even if the government does its utmost to preserve and protect the civil liberties of detainees—and does in fact only detain citizens as enemy combatants when it has impeccable proof—the fear that the system is not so pure, and the government's reluctance thus far to disprove that fear, compounds this public-relations nightmare and leads some to believe that the government is overstepping its constitutionally granted power and violating citizens' civil liberties.

IV. THE MATTER OF THE MODEL

One reason the government should detail its process and method used to determine the enemy-combatant status of citizens is to inform those who may commit future acts. Although it seems illogical, terrorists and potential terrorists should know the standards they will be judged by so they can consider both those standards and that judgment before they plan and act. Open standards and disinterested arbiters of those standards are part of our rule-of-law tradition; this may well be the "freedom" we fight for in the "war on terror."

The secretive standards for detaining U.S. citizens as enemy combatants . . . are filled with pitfalls and dangers to both public safety and civil liberties.

Of course, some might argue that muddled, confusing, and shifting standards provide a better deterrent against a shadowy enemy. Perhaps not knowing what they will be arrested for and how they will be treated is more of a deterrent than definitive knowledge that grave actions will carry grave consequences. Yet even if effective, that tactic pulls our government away from its historical tradition of the rule of law. If the government keeps its citizen-detention standards a mystery, it will exchange our inherent moral compass for a tactic that has not been proven effective. As a tactic, mysterious standards may be effective in the short run, but in the long run, they are self-defeating. Shrouding the substantive standards used by the government in mystery may cause us to lose a chance at deterrence and may harm the global view of the United States.

Dean Peter Raven-Hansen has made the important point that "'you can look it up' is an Americanism central to the rule of law and lawmaking. Yet, while a non-citizen could look up the November 13 Order in the Federal Register,[103] United States citizens Hamdi and Padilla, ironically, could not look up the law governing their detention before the *Hamdi* decision."[104]

Sunlight cast on these standards would not really be for the sake of those individual terrorists and potential terrorists (who are not likely to be deterred by reading published standards),

opinion. "As for concerns about national security during the judicial process, it is axiomatic that the government has a legitimate interest in the protection of the classified information that may be necessarily be used in the prosecution of an alleged terrorist such as Petitioner. This Court is of the firm opinion, however, that federal law provides robust protection of any such information. E.g. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III." *Padilla*, 389 F. Supp.2d. at 692 n.13. The district court added that enemy-combatant detention is not necessary "because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla's arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was brought before a civilian judge. He was imprisoned in a civilian facility in New York. Everything occurred according to the civilian process in the way it is supposed to. And it's not only not necessary, but not appropriate. It's not appropriate because it directly conflicts with the limits on detention that Congress has set by statute and the limits that the framers set on presidential power." *Id.* at 686.

102. Hamdi, 542 U.S. at 560-561.
103. One also could find it on the White House website. The White House, Office of the Press Secretary (Nov. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited Feb. 25, 2007).
104. Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorism*, 64 LA. L. REV. 831, 846-847 (2004).
105. Ex Parte Milligan, 71 U.S. 2, 119 (1866).

but should be published for the sake of fledgling and developing democracies, who model their actions and laws after those of the United States. The rule of law and the Constitution are examples to be dispersed across the world. The Court wrote in *Milligan* of the power of punishment through the law "no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."[105]

More than a century later, Ronald Reagan and others spoke of America as a "shining city upon a hill" that is "still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home."[106] Even if no law requires the government to publish these standards, the United States—the "shining city upon a hill"—has a moral imperative to share its standards.

Sharing standards also means sharing America's values. No country stands before the United Nations to argue for the right to declare political dissidents to be enemy combatants based on little proof of wrongdoing simply because the governments of Syria, Iran, or North Korea do so. Yet, if they can make that argument using a United States example, the cause of liberty worldwide is damaged. Additionally, emerging democracies often base their constitution and governmental system at least in part on that of the United States. A clear, open model can shape the detention standards of frail emerging democracies like those in Afghanistan and Iraq. While we can be fairly confident that our executive branch is careful to balance national security with civil liberties, it is all too easy in developing countries for leaders to deal with dissent via the proverbial "knock on the door in the night," and then to detain citizens based on scant evidence for which the writ of habeas corpus, the most important of rights, is so necessary to protect against.[107]

Thus there are two reasons for the United States to release the standards it uses to detain citizens as enemy combatants. The first is the importance to our nation and the world of morally clear rule-of-law decisions. The second reason is for democracies around the world who look to the United States as a model and pattern their actions after ours. In being open and honest about the standards it uses to detain its own citizens, the United States can address and ensure the strength of its own democracy and that of dozens of democracies developing across the globe.

In the century before last, the Court wrote that "it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals."[108] If the United States upholds strict standards, it has the moral force to hold other nations to the same strict standards. If the government were more open about the standards and factors it uses to determine when it has the unilateral right to whisk a citizen away to a military brig, world leaders who detain their citizens could not use our secrecy to justify their own. Whatever the standards are for detaining American citizens as enemy combatants, the United States should publish and clarify those standards so both its own citizens, and those of the rest of the world, will know the standards by which they are judged.

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106. Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989), *available at* http://www..ronaldreagan.com/sp_21.html (last visited, Feb. 25, 2007).
107. *See* Zacharias Chafee, Jr., *The Most Important Human Right in the Constitution* 32 BOSTON UNIVERSITY L. REV. 143 (1952).
108. Brig Amy Warwick, 67 U.S. 635, 667 (1863).

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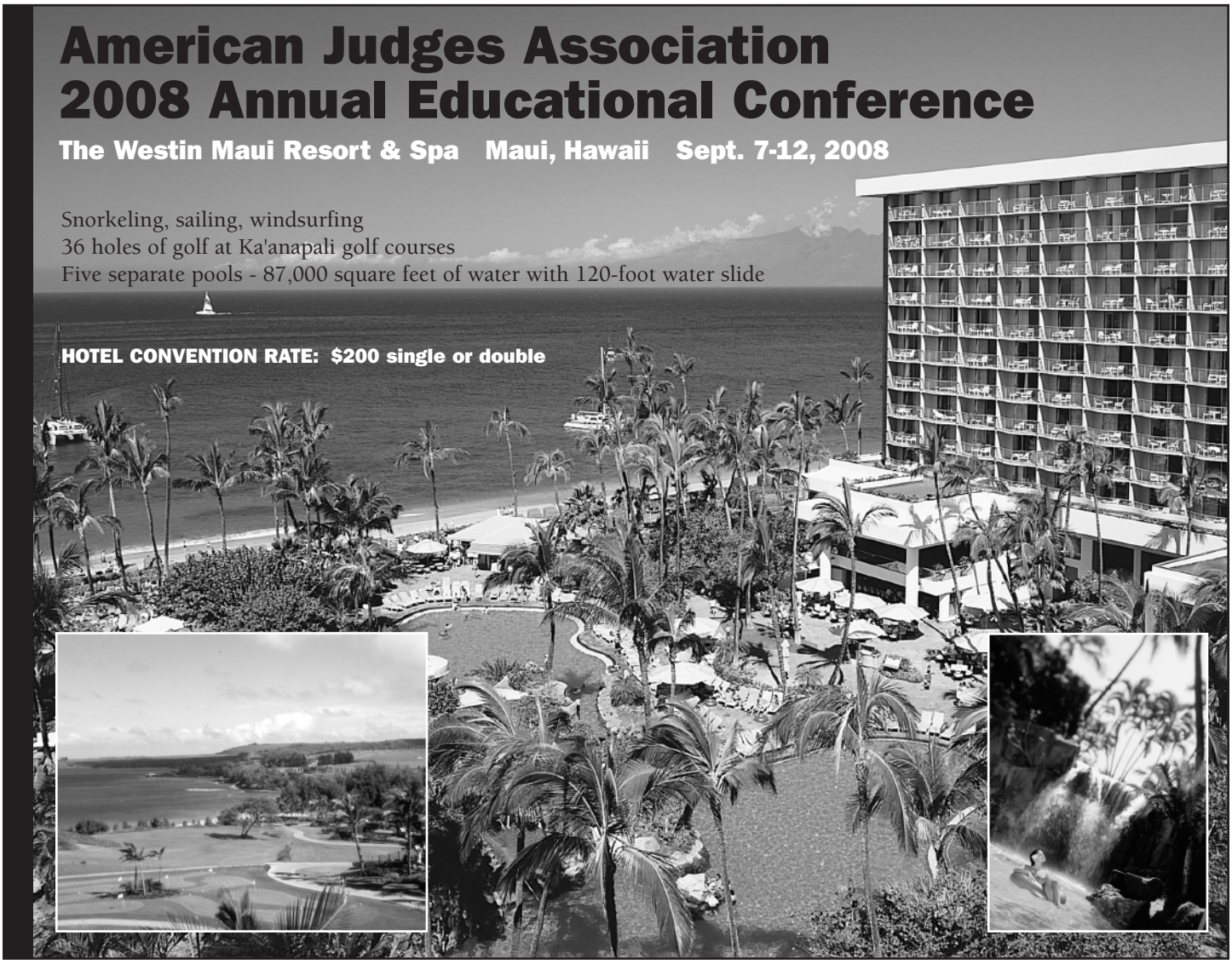


The Resource Page

WEBSITES

RESOURCES ON PROBLEM-SOLVING JUSTICE

Center for Court Innovation
www.problemsolvingjustice.org

National Center for State Courts
www.ncsconline.org/PSC

Two excellent web-based resources now exist for judges to explore the concepts behind a problem-solving approach to justice. New York's Center for Court Innovation has set up a website, and the National Center for State Courts established one last year.

Both of the websites attempt to go beyond application of these concepts in specialized courtrooms and dockets, like drug courts or mental-health courts. The concepts involved in problem-solving justice—such as informed decision-making, judicial monitoring, community engagement, a focus on results—can be applied in many contexts.

The Center for Court Innovation's site includes an overview of the principles of problem-solving justice, a set of fact sheets and self-assessment tools, and several monographs exploring the concepts in detail. Another feature that will be helpful to many is an easy-to-access set of sample documents from courts around the country. You can look at (and perhaps adapt to your own court) a record used for recording community service work in a South Carolina pretrial intervention program, a community-court-volunteer application from San Diego, a training curriculum used for police officers by a community court in Atlanta, or a community survey used by a court in Virginia.

The National Center for State Courts has its online Problem-Solving Justice Toolkit. The toolkit is interactive, so that you can easily move to the resources of most interest to you. It includes explanatory text, hundreds of links to online resources, and videoclips from 22 judges, attorneys, social workers, and court managers discussing topics related to problem-solving justice.

To use the toolkit, go to the section marked "Initial Assessment Questions." Based on what you are most interested in (such as resources available to address problems you've been seeing), you'll be taken to the resources in that area.

THE POLLING REPORT
www.pollingreport.com

Political junkies and students of public opinion will find this website—and its twice-monthly newsletter—of great interest. It is the primary source of public-opinion information found on the *Court Review* Resource Page.

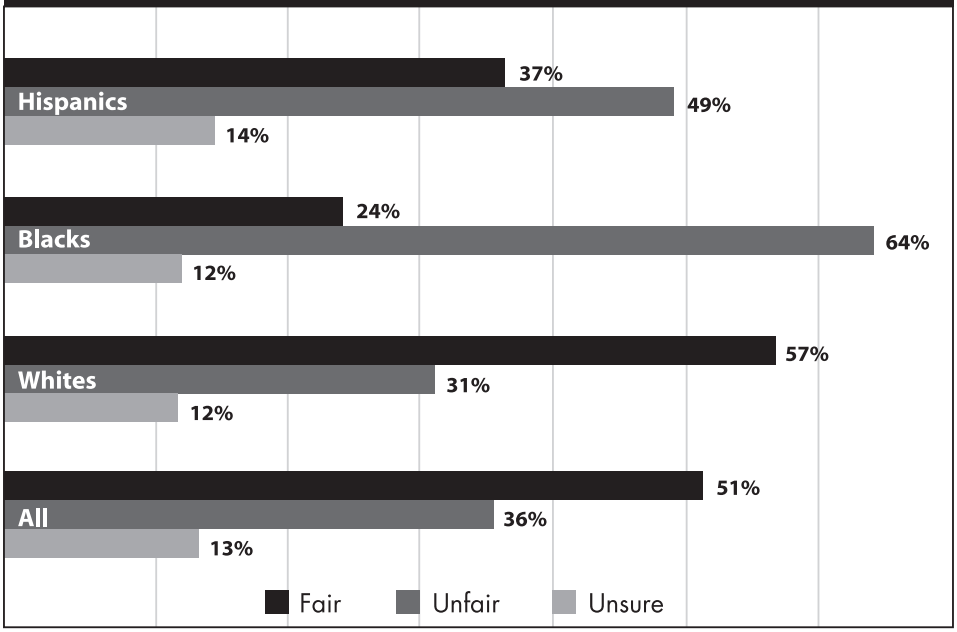
On the public side of its website, you can always find the latest surveys on approval of the United States Supreme Court. You'll also find a section of the website providing survey responses on the law and civil rights.

In addition, of course, you'll find polls and analysis regarding the campaign for President and campaigns in every state for the Senate, for Congress, or for Governor.

Subscribers ($195 per year) receive the newsletter, which provides analysis of trends in public opinion. Though it is focused primarily on political trends, there is also broader discussion of opinion and the issues that shape it. Articles go behind the raw numbers and discuss the ways in which politicians in both parties try to shape their messages to tap into current views of the voters. Subscribers also receive access to a portion of the website that has daily updates of opinion polls in every state. Those who have a strong interest in the presidential election and the potential results in key states will find those polls of substantial interest as November approaches.

PUBLIC OPINION: FAIRNESS OF THE DEATH PENALTY

QUESTION: GENERALLY SPEAKING, DO YOU BELIEVE THE DEATH PENALTY IS APPLIED FAIRLY OR UNFAIRLY IN THIS COUNTRY TODAY?



Source: Pew Research Center/National Public Radio survey conducted by Princeton Survey Research Associates International, Sept. 5-Oct. 6, 2007, as reported in The Polling Report (Nov. 12, 2007). N=3,086 adults nationwide, including 1,536 non-Hispanic whites, 1,007 non-Hispanic blacks, and 388 Hispanics.